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## Racial Bias in American Foster Care: The National Debate

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**RACIAL BIAS IN AMERICAN FOSTER  
CARE: THE NATIONAL DEBATE**

TANYA ASIM COOPER\*

*In disproportionately high numbers, Native American and African American children find themselves in the American foster care system. Empirical data establish that these children are removed from their families at greater rates than other races and stay in foster care longer, where they are often abused, neglected, and then severed from their families forever. For the past few decades, a vigorous debate has raged regarding whether these children are actually at greater risk for maltreatment if left at home or are just targets of discrimination in a hegemonic institution. Although the research previously showed no racial differences in child maltreatment rates, the latest Congressional study has found that African American and Native American children are at greater risk for child maltreatment than children of other races. Despite the caution with which researchers have interpreted the data and implicated future policies, scholars are asking whether, as a society, we are protecting or destroying children from these historically disempowered races. Foster care laws offer little practical guidance because the overarching legal*

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*standards are too vague or not consistently applied. Systems thinking, however, provides one useful framework for uncovering points in the foster care system where unintended bias manifests and potential leverage points to exert pressure and effect change. A systems thinking approach also reveals that the foster care system's primary motivation is simply perpetuating itself; accordingly, to achieve meaningful reform, public policy makers in the U.S. must closely examine this billion-dollar, publicly-funded bureaucracy and the racial disparities it routinely fosters.*

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## I. INTRODUCTION

Professionals in the foster care system routinely contend that Native American and African American children are the most at-risk for child abuse and neglect,<sup>1</sup> a presumption currently reflected in the system.<sup>2</sup> Based on this belief, the system removes these children from their families at rates higher than children of any other race.<sup>3</sup> Whether this disproportionate representation in foster care of African American and Native American minorities is justified or biased is the question in the ongoing national debate.<sup>4</sup>

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1. See *infra* Part II.A.

2. Foster care and child welfare are used synonymously in this Article and are referred to as the foster care system or system. Quoting the Child Welfare League of America, the United States Supreme Court has defined foster care as “[a] child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period.” *Smith v. Org. of Foster Families*, 431 U.S. 816, 823 (1977) (quoting CHILD WELFARE LEAGUE OF AMERICA: STANDARDS FOR FOSTER FAMILY CARE SERVICE 5 (1959)) (internal quotation marks omitted). “The term ‘foster care’ is often used more generally to apply to any type of care that substitutes others for the natural parent in the parental role, including group homes, adoptive homes, and institutions, as well as foster family homes.” *Id.* at 823 n.8 (citing ALFRED KADUSHIN, CHILD WELFARE SERVICES 355 (1967)); cf. Robert H. Mnookin, *Foster Care—In Whose Best Interests?*, 43 HARV. EDUC. REV. 599, 600 (1973) (referring to foster care as including “foster family homes, group homes, and child welfare institutions”). For an explanation on how the foster care system is designed in theory, see CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 7 (2013), available at <https://www.childwelfare.gov/pubs/factsheets/cpswork.pdf#Page=1&view=Fit> (articulating the federal government’s twin goals of promoting children’s safety and well-being and strengthening families to care for their own children successfully); CONNA CRAIG & DEREK HERBERT, THE STATE OF THE CHILDREN: AN EXAMINATION OF GOVERNMENT-RUN FOSTER CARE, NCPA REPORT NO. 210 (1997), available at <http://www.ncpa.org/pdfs/st210.pdf>.

3. See ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS 1 (2007), available at <http://www.aecf.org/~media/Pubs/Topics/Child%20Welfare%20Permanence/Other/AnAnalysisofRacialEthnicDisproportionalityand/Bob%20Hill%20report%20natl%20state%20racial%20disparity%202007.pdf> (finding that African American and Native American children are “overrepresented disproportionately within the foster care system at the national level”). Conversely, White children are disproportionately underrepresented, which “strongly suggests that . . . foster care is truly considered a last resort and an extreme remedy” for this race. Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 144 n.13 (1999).

4. Compare Elizabeth Bartholet et al., *Race and Child Welfare*, CHAPIN HALL ISSUE BRIEF, June 2011, at 1, 2 [hereinafter *Race and Child Welfare*], available at <http://www.law.harvard.edu/faculty/bartholet/RD%20Conference-%20Issue%20Brief%20-%20Final.pdf> (“A central debate in the field regarding high black representation in the child

The nation's poorest children, not surprisingly, make up most of the foster care population.<sup>5</sup> African Americans and Native Americans are disproportionately poor, and that correlation increases the probability of foster care for these races.<sup>6</sup>

Once in foster care, however, children face heightened risk for abuse and neglect within the system itself and generally suffer poorer outcomes and prospects, as studies and current events repeatedly demonstrate.<sup>7</sup> What this means, therefore, is that African American and

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welfare system has revolved around whether there is a black/white maltreatment gap.”), and Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 871 (2009) [hereinafter *False Facts and Dangerous Directions*] (“But the central question is whether black children are disproportionately victimized by maltreatment. If so, black children should be removed at rates proportionate to their maltreatment rates, which will necessarily be disproportionate to their population percentage.”), with Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2003) (stating that American foster care “is basically an apartheid institution”), and Barbara Bennett Woodhouse, Keynote, *Race, Culture, Class and the Myth of Crisis: An Ecogenerist Perspective on Child Welfare*, 81 ST. JOHN’S L. REV. 519, 524 (2007) (“Our child welfare programs and priorities are distorted by ideologies about race, class, and individual responsibility that have nothing to do with children’s safety or well-being.”). See also Patrick McCarthy, *The Alliance for Racial Equity in Child Welfare—Yesterday, Today and Tomorrow*, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH, at v (2011), available at [http://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare\\_An-Analysis-of-the-Research-December-2011.pdf](http://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf) (“The debate over racial disparity and disproportionality is bound to be enlightening, provocative, and perhaps even a bit contentious. That’s nothing we should be afraid of.”).

5. There is a high correlation between neglect and poverty, and the two have often been confused in foster care. See *infra* Part II.B.

6. See Guggenheim, *supra* note 3, at 145 (stating that “there is a well-known, direct nexus between poverty and race”). See generally LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES (1989).

7. See *infra* Part II.D (exploring the empirical research on abuse in foster care). One example of such abuse includes ten children, now adults, “who were fraudulently adopted by a woman and claimed they were repeatedly abused, starved and imprisoned in a ‘house of horrors.’” Tom McElroy, *NYC Settles Suit by Abused Foster Kids for \$9.7M*, ASSOCIATED PRESS, (Dec. 6, 2012), <http://bigstory.ap.org/article/nyc-settles-foster-adoptions-abuse-suit-97m> (reporting that of the twenty-two children this woman fostered, “[o]ne is missing and presumed dead”).

This Article does not dispute that some children truly need foster care. See, e.g., MARC WINOKUR ET AL., NINTH ANNUAL CAMPBELL COLLABORATION COLLOQUIUM: BETTER EVIDENCE FOR KINSHIP CARE AROUND THE WORLD 13 (2009), available at [http://www.campbellcollaboration.org/artman2/uploads/1/Winokur\\_kinship\\_care.pdf](http://www.campbellcollaboration.org/artman2/uploads/1/Winokur_kinship_care.pdf) (“Foster care remains an essential out-of-home care option, as children in these placements also experience positive outcomes and appropriate kinship placements are not always available.”). But as history has revealed, foster care has been overused as a first and not last resort for children of color. See Guggenheim, *supra* note 3, at 142, 144 n.13.

Native American children, especially those who are poor, are disproportionately more likely to enter foster care, where they are at high risk of secondary harm by the system itself.<sup>8</sup>

Foster care is a big, billion-dollar business.<sup>9</sup> Craig and Herbert estimated in 1997 that publicly-funded foster care cost American taxpayers annually \$12 billion;<sup>10</sup> one year in foster care per child cost \$17,500;<sup>11</sup> group-home foster care per child in 1994 cost \$36,500;<sup>12</sup> and institutional placements in some states per-year, per-child cost \$42,000.<sup>13</sup> Costs since 1997 only rose, as ABC News reported in 2006: “Despite more than a decade of intended reform, the nation’s foster care system is still overcrowded and rife with problems. But taxpayers are spending \$22 billion a year—or \$40,000 a child—on foster care programs.”<sup>14</sup>

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8. See Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007), available at [http://www.mit.edu/~jjdoyle/fostercare\\_aer.pdf](http://www.mit.edu/~jjdoyle/fostercare_aer.pdf) (“Those placed in foster care are far more likely than other children to commit crimes, drop out of school, join welfare, experience substance abuse problems, or enter the homeless population.”).

9. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-312, FOSTER CARE PROGRAM: IMPROVED PROCESSES NEEDED TO ESTIMATE IMPROPER PAYMENTS AND EVALUATE RELATED CORRECTIVE ACTIONS app. II at 41–42 (2012) [hereinafter GAO REPORT], available at <http://gao.gov/assets/590/589114.pdf> (citing foster care fiscal year 2010 expenditures as reported by states for child placement in foster care, maintenance, foster care operations, and training totaled \$4.5 billion); U.S. Dep’t of Health & Human Servs., *Title IV-E Adoption Assistance and Foster Care Programs*, HHS.GOV/RECOVERY, <http://web.archive.org/web/20130511075826/http://www.hhs.gov/recovery/programs/acf/adoption-foster.html> (last visited Nov. 13, 2013) [hereinafter *Title IV-E Adoption Assistance and Foster Care Programs*] (“In Fiscal Year 2008, federal funding for these programs was over \$6.5 billion.”) (accessed by searching for <http://www.hhs.gov/recovery/programs/acf/adoption-foster.html> in the Internet Archive index); CRAIG & HERBERT, *supra* note 2, at 1; *Facts on Foster Care in America*, ABC NEWS (May 30, 2006), <http://abcnews.go.com/Primetime/FosterCare/story?id=2017991&page=1>.

10. CRAIG & HERBERT, *supra* note 2, at 1 (noting that America spends more on the foster care “industry” than on major league baseball).

11. *Id.* (notwithstanding the costs of treatment or counseling programs for natural parents or costs of recruiting adoptive parents, according to AMERICAN CIVIL LIBERTIES UNION, Children’s Rights Project, *Children’s Rights Fact Sheet*, at 1 (Jan. 1995)). *But cf.* EDWARD SCHUMACHER-MATOS, INDIAN FOSTER CARE IN S. DAKOTA: A CASE STUDY IN INVESTIGATIVE STORYTELLING GONE AWRY 36 (2013), available at <http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf> (“According to Kim Malsam-Rysdon, the head of South Dakota’s Department of Social Services, South Dakota in 2010 received \$11,344 per child [of federal funding reimbursements for its foster care program], less than half the national average of \$25,019.”).

12. CRAIG & HERBERT, *supra* note 2, at 1.

13. See *id.* (citing data from the State of Michigan).

14. *Facts on Foster Care in America*, *supra* note 9. In a highly-publicized and hotly-debated series on National Public Radio, it was reported but not ultimately disputed that

According to the Government Accountability Office,

Each year, hundreds of thousands of the nation's most vulnerable children are removed from their homes and placed in foster care. While states are primarily responsible for providing safe and stable out-of-home care for these children, Title IV-E of the Social Security Act provides federal financial support. The Administration for Children and Families (ACF) in the Department of Health and Human Services (HHS) is responsible for administering and overseeing federal funding for Foster Care.<sup>15</sup>

Financial incentives in federal laws and policies perpetuate state practices to place children in government-subsidized foster care rather than leaving the children in their own homes and providing their families with aid, which is much cheaper.<sup>16</sup> These costs to America's children and taxpayers warrant close scrutiny.

With the release of the *Fourth National Incidence Study of Child*

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South Dakota alone receives tens of millions of dollars per year from the federal government to subsidize its foster care program. Compare Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster Care System*, NAT'L PUB. RADIO (Oct. 25, 2011, 12:00 PM), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system> [hereinafter *Incentives and Cultural Bias Fuel Foster Care System*] (summarizing key findings of their investigation of South Dakota's foster care system), with SCHUMACHER-MATOS, *supra* note 11, at 5 (questioning the investigation of Sullivan and Walters and clarifying that “[t]he \$100 million refers to reimbursements for children of all races and ethnic groups in South Dakota, including white”).

15. GAO REPORT, *supra* note 9; see also *Title IV-E Adoption Assistance and Foster Care Programs*, *supra* note 9 (“The Foster Care Program helps States to provide safe and stable out-of-home care for children until the children are safely returned home, placed permanently with adoptive families or placed in other planned arrangements for permanency. . . . The Foster Care and Adoption programs are authorized under title IV-E of the Social Security Act, as amended, [to] help states, including the District of Columbia and Puerto Rico.”).

16. *Smith v. Org. of Foster Families*, 431 U.S. 816, 835 n.35 (1977) (noting that “systems of foster-care funding . . . encourage agencies to keep the child in foster care”); Guggenheim, *supra* note 3, at 142 (“Most startling, Congress revealed that federal policy, as well as federal laws in effect through the 1970s, created financial incentives for state officials to rely on foster care as a first, rather than a last, alternative.”); Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1626 (2001) (remarking on the “government’s perverse willingness to give more financial aid to children in state custody than to children in the custody of their parents”); *Facts on Foster Care in America*, *supra* note 9 (interviewing former “highest federal official in charge of foster care, Wade Horn of the Department of Health and Human Services, . . . who says the foster care system is a giant mess and should just be blown up. [Wade Thorn is] most critical of the way foster care gets funded by the federal government—\$5 billion that goes mostly, he says, to keeping kids in foster care”).

*Abuse and Neglect* (NIS-4), and national organizations, leading scholars, and local jurisdictions around the country focusing on unintended bias in foster care systems,<sup>17</sup> the civil rights debate on foster care continues.<sup>18</sup> Many believe the system protects the most vulnerable from maltreatment while others believe it exploits the most disenfranchised.<sup>19</sup> Because foster care is a direct function of the political and social will of the people at a particular point in American history, this billion-dollar enterprise will always be relevant.<sup>20</sup>

This Article explores the central debate on bias, race, and poverty in America's foster care system, and aims to highlight those places in the system where unintended bias manifests and consequently affects

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17. See, e.g., Child Advocacy Program, *Race & Child Welfare: Disproportionality, Disparity, Discrimination: Re-Assessing the Facts, Re-Thinking the Policy Options*, HARV. L. SCH., (Jan. 28–29, 2011), <http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference/rd-video/rd-conference-index.html> [hereinafter *Race and Child Welfare Conference*] (working conference video recording); Nat'l Ass'n of Counsel for Children, *34th National Child Welfare, Juvenile, and Family Law Conference: Eliminating Unintended Bias*, 33 GUARDIAN, no. 2, 2011, at 2, 5–6, available at [http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/guardian/the\\_guardian\\_2011\\_v33n2\\_r3.pdf](http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/guardian/the_guardian_2011_v33n2_r3.pdf) (presentations of *Race: The Power of an Illusion, Bias in Decision-Making*, and *Child Safety Decision-Making: An Introduction to Key Concepts and Tools*) (conference brochure and materials on file with author); Tex. Ctr. For The Judiciary, *The Fourth Annual Implicit Bias Conference*, YOURHONOR.COM (Mar. 25–26, 2013), <http://www.yourhonor.com/single-conference/94> (foster care conference brochure on file with author); *Dismantling Structural Racism in the Foster Care & Juvenile Delinquency Systems: Homes, not Institutions—Justice for the Next Generation*, TIMEBANKS USA (Aug. 4, 2011) (on file with author).

18. See Tanya Asim Cooper, *Race Is Evidence of Parenting in America: Another Civil Rights Story*, in CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS 103 (forthcoming Cambridge University Press 2014) (Austin Sarat ed.). This debate has occurred in waves over the past three decades; each release of the *National Incidence Study on Child Abuse and Neglect* sparks conversation, and recent news about biased or unfair practices against particular groups ignite controversy. Compare, e.g., Laura Sullivan & Amy Walters, *Native Foster Care: Lost Children, Shattered Families*, NAT'L PUB. RADIO (Oct. 25, 2011, 12:01 PM), <http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families> [hereinafter *Native Foster Care*] (reporting the results of NPR's yearlong investigation of cultural bias in South Dakota's foster care system), with SCHUMACHER-MATOS, *supra* note 11, at 1–2 (responding as NPR's ombudsman to the criticism by South Dakota and finding after his own investigation, the reporting was deeply flawed and without hard proof of biases against Native Americans in South Dakota's foster care system), and Kinsey Wilson & Margaret Low Smith, *Editors' Note*, NAT'L PUB. RADIO (Aug. 9, 2013, 7:50 PM), available at <http://www.npr.org/2013/08/09/210615253/editors-note> (“NPR stands by the stories.”).

19. See *infra* Part II.C.

20. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE*, at vi (2002) (“Child protection policy has conformed to the current political climate . . .”); *Race and Child Welfare Conference*, *supra* note 17 (questioning to what extent foster care policies reflect and reinforce the disadvantaged status of African Americans in this country).



decisions regarding which children are removed from their families and placed in foster care.<sup>21</sup> Foster care laws vacillate in intent and effect, but as discussed in this Article, the laws themselves are vague and their practice is particularly vulnerable to biased decision-making that frequently increases the risk of error and secondary harm to these already disenfranchised families.<sup>22</sup>

Using the lens of systems theory<sup>23</sup> to conceptualize the foster care system reveals key decision points vulnerable to bias where the high risk of secondary harm to children in foster care can far outweigh any benefits of removal from the children's own homes.<sup>24</sup> Systems thinking framework also points to those solutions most likely to strengthen the critical junctures in the system that are vulnerable to bias in American foster care—a system that most agree is flawed.<sup>25</sup>

## II. AMERICA'S FOSTER CARE SYSTEM

Foster care in America appears to target African American and Native American and poor children, as this Section explores. This is not a new phenomenon,<sup>26</sup> which history reveals, but the question of why has

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21. Although beyond the scope of this Article, bias in foster care has many faces. *E.g.*, Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 2–3 (2010) (exposing the inherent bias against parents deemed “monstrous” and “deviant” in the master narrative of child welfare); David Crary, *Disabled Parents Face Bias, Loss of Kids, Report Shows*, LUBBOCK AVALANCHE-J., Nov. 25, 2012, <http://lubbockonline.com/life/2012-11-25/disabled-parents-face-bias-loss-kids-report-shows#.UokLV6UvpG4> (citing a new governmental report estimating that “6.1 million U.S. children have disabled parents . . . [who] are more at risk than other parents of losing custody of their children”); Camilo Ortiz, *Same-Sex Adoption, Special Needs Children, and Authoritarianism: An Untold Narrative* (unpublished manuscript on file with author) (revealing a bias in the placement of special-needs foster children with same-sex foster parents).

22. *See infra* Parts II.D, III.

23. *See infra* Part IV.A (describing the systems theory as an evaluation method that addresses the interconnection among elements in a way that can help understand particular behaviors over time and determine where change is most effective).

24. *See infra* Part II.D (discussing the various secondary harms to children in foster care).

25. ROBERTS, *supra* note 20, at vi (remarking on the system being “condemned by conservatives and liberals alike”); Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL’Y 63, 63 (1999) [hereinafter *Poverty, Race, and New Directions in Child Welfare Policy*] (“The perspective does not matter; social workers, sociologists, politicians, promoters of adoption, and promoters of family preservation all agree that something is terribly wrong with our child welfare system.”).

26. *See* HILL, *supra* note 3, at 1.

caused some disagreement.<sup>27</sup> No one can deny, however, the secondary harms that foster care causes, and “[t]he fact that [a] system supposedly designed to protect children remains one of the most segregated institutions in the country should arouse our suspicion.”<sup>28</sup>

### A. *The Racial Makeup of Foster Care*

The foster care system in America serves around half a million children each year.<sup>29</sup> Of those hundreds of thousands of children, children of color represent the greatest percentages of children in foster care when compared with their respective numbers in the general population—also known as racial disproportionality.<sup>30</sup> African

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27. *Compare False Facts and Dangerous Directions*, *supra* note 4, at 923 (attributing the disparity to the fact that black children are subject to more abuse and neglect), *with* Sandra T. Azar & Philip Atiba Goff, *Can Science Help Solomon? Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making*, 81 ST. JOHN'S L. REV. 533, 541–42 (2007) (identifying the possibility that the racial disparity is due to minority bias and greater scrutiny towards those families).

28. ROBERTS, *supra* note 20, at vi; *see also Race and Child Welfare Conference*, *supra* note 17 (leading some to question where these disparities come from: inequities outside of the system, bias within it, or both).

29. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., TRENDS IN FOSTER CARE AND ADOPTION: FY2002–FY2012, at 1 (2013) [hereinafter TRENDS IN FOSTER CARE AND ADOPTION], *available at* [http://www.acf.hhs.gov/sites/default/files/cb/trends\\_fostercare\\_adoption2012.pdf](http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf). Although the federal government reported a “substantial decline in the numbers of children in foster care” from 2002 to 2011, *id.* at 3, each year in the last decade more than 500,000 children were “served.” *Id.* at 1–2 (providing “an estimated count of all children who were in the public foster care system” during the federal fiscal year). *Compare Facts on Foster Care in America*, *supra* note 9 (reporting 518,000 American children in foster care on September 30, 2004), *and* CRAIG & HERBERT, *supra* note 2, at 4 (reporting more than 650,000 American children were in foster care in 1997 compared to 526,112 children in 1996), *with* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 1 (2013) [hereinafter AFCARS REPORT], *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf> (reporting preliminary FY 2012 estimates on the number of children in foster care and charting a generally steady decline in the number since 2008: 2008 (463,792), 2009 (420,415), 2010 (405,224), 2011 (397,866), and 2012 (399,546)). Compare the number of children actually “in care” as of September 30, 2012, at 400,000 with the number of children “served” by foster care as of the same date at 641,000. TRENDS IN FOSTER CARE AND ADOPTION, *supra* at 1. This number is down from FFY 2002 when foster care served 800,000. *Id.*

30. *See* DOROTHY ROBERTS, THE RACIAL GEOGRAPHY OF CHILD WELFARE 3 (2010) [hereinafter RACIAL GEOGRAPHY OF CHILD WELFARE], *available at* [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CGUQFjAI&url=http%3A%2F%2Fwww.oregon.gov%2Fdhhs%2Fchildren%2Fbeyondfc%2Fdocs%2Fnews-2010-0927-racial-present.ppt&ei=5e8fUcGRKIae8QTtu4D4Ag&usg=AFQjCNFVEvWDhKC8w5iPF38LDWr\\_1s8b9g&bvm=bv.42553238,d.eWU](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0CGUQFjAI&url=http%3A%2F%2Fwww.oregon.gov%2Fdhhs%2Fchildren%2Fbeyondfc%2Fdocs%2Fnews-2010-0927-racial-present.ppt&ei=5e8fUcGRKIae8QTtu4D4Ag&usg=AFQjCNFVEvWDhKC8w5iPF38LDWr_1s8b9g&bvm=bv.42553238,d.eWU) (defining overrepresentation as the “percentage of children in system from racial group is greater than group's proportion in the general population”); *Race and Child Welfare*, *supra* note 4, at 1 (defining racial disproportionality in

American and Native American children, in particular, are disproportionately represented in foster care, compared to White children.<sup>31</sup>

In 2013, African American children comprised only 13.9% of the overall population of children in the United States<sup>32</sup> but represented nearly double that percent in foster care at 26% (or 101,938 African American children).<sup>33</sup> Likewise, Native American children comprised 0.9% of all U.S. children in 2013,<sup>34</sup> but represented double that in foster care at 2% (or 8,344 Native American children).<sup>35</sup> In some states with high populations of Native Americans, the disproportionality is particularly stark.<sup>36</sup> In South Dakota for example, Native American

child welfare as the “high representation of [African American] children in the child welfare system as compared to their percentage in the general population” (footnote omitted).

31. HILL, *supra* note 3, at 1, 9–10, 12 (noting that African American and Native American children are disproportionately overrepresented in foster care on a “national level” and Asian Americans, by contrast, are disproportionately underrepresented); ALICIA SUMMERS ET AL., NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES JUVENILE LAW PROGRAM, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE: TECHNICAL ASSISTANCE BULLETIN 7 (2013), *available at* <http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%20in%20Foster%20Care%202013.pdf> (“While the over representation of African American children occurs in nearly every state, Native American disproportionality occurs in fewer states but with higher rates.”); *Race and Child Welfare*, *supra* note 4, at 1 n.2 (acknowledging the high representation of Native Americans in foster care); RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30, at 3 (noting that in 2000, African Americans represented 15% of the general population versus 41% in foster care; Native Americans represented 1% of the general population versus 2% in foster care). *Cf.* CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 4 (2011) [hereinafter ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE], *available at* [https://www.childwelfare.gov/pubs/issue\\_briefs/racial\\_disproportionality/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubs/issue_briefs/racial_disproportionality/racial_disproportionality.pdf) (noting the low representation of Asian American children in foster care).

32. U.S. Census Bureau, Population Div., *POP3 Race and Hispanic Origin Composition: Percentage of U.S. Children Ages 0–17 by Race and Hispanic Origin, 1980–2012 and Projected 2013–2050*, <http://www.childstats.gov/americaschildren/tables/pop3.asp?popup=true> (last visited Nov. 13, 2013) (counting non-Hispanic African Americans).

33. AFCARS REPORT, *supra* note 29, at 2. African American children historically have made up nearly half of the foster care population at times when they constituted less than twenty percent of all the nation’s children; *see also* ROBERTS, *supra* note 20, at vi.

34. U.S. Census Bureau, *supra* note 32 (counting non-Hispanic Native Americans).

35. AFCARS REPORT, *supra* note 29, at 2.

36. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 3 (“[W]hile Native American children constitute 2 percent of the foster care population nationally, they are overrepresented in States where there are larger Native American populations, such as Hawaii (10.5 percent), Minnesota (8.2 percent), and South Dakota (7.9 percent).”) (citing HILL, *supra* note 3); SUMMERS ET AL., *supra* note 31, at 3–4 (finding greater disproportionality of Native Americans as of 2011 in Alaska, California, Idaho, Iowa,

children make up less than 15% of the general population but represent over half of that state's foster care population.<sup>37</sup>

African American and Native American families are more likely to be investigated for child abuse and neglect than White families,<sup>38</sup> and their children are more likely to be removed from their parents and placed in foster care than Whites.<sup>39</sup> Although the exact figures and disproportionality index have changed over the last decade, the fact that African American and Native American children in foster care are disproportionately represented has remained constant over time.<sup>40</sup> This phenomenon is not disputed.<sup>41</sup>

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Minnesota, Montana, Nebraska, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Washington, and Wisconsin).

37. *Native Foster Care*, *supra* note 18 (reporting how nearly 700 Native American children are removed from their homes every year); *see also* SCHUMAKER-MATOS, *supra* note 11, at 3 (criticizing the reporting, but not ultimately disputing the numbers of Native American children removed there).

38. John D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. & YOUTH SERVS. REV. 359, 364–65, 367 (2003); Sophia I. Gatowski et al., *Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care—Transforming Examination into Action*, JUV. & FAM. JUST. TODAY, Summer 2008, at 16, 17.

39. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 8 (“Not only are minority families disproportionately reported for abuse and neglect, their cases are also more likely to be substantiated at investigation.”); ROBERTS, *supra* note 20, at vi (pointing out the fact that African Americans are the most likely race to see their families disrupted by government authorities); Fluke et al., *supra* note 38, at 364–65, 367; Gatowski et al., *supra* note 38, at 16; RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30, at 3–6 (noting sharper rates in San Francisco, California, in 2006 when “Native American children were 22 times more likely than white children to be in care” and “[African American] children were 19 times more likely than white children to be in care”).

40. SUMMERS ET AL., *supra* note 31, at 1 (“While disproportionality rates increased between 2000 and 2004, African American/Black disproportionality has now decreased to 2.0 from 2.5 nationally. Native American disproportionality has increased over the last ten years from 1.5 to 2.1.”); *see also* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 584 (1997) [hereinafter *Protecting Children or Punishing Mothers*]; *Poverty, Race, and New Directions in Child Welfare Policy*, *supra* note 25, at 64.

41. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 2 (“A significant amount of research has documented the overrepresentation of certain racial and ethnic groups, including African-Americans and Native Americans, in the child welfare system when compared with their representation in the general population . . .” (footnote omitted)). “The child welfare community has moved from acknowledging the problem of racial and ethnic disproportionality in the child welfare system to formulating and implementing possible solutions.” *Id.*; McCarthy, *supra* note 4, at v (“Thanks to the research carried out by many researchers . . . we know that some families of color are disproportionately represented in the child welfare system . . .”); SUMMERS ET AL., *supra* note 31, at 3–4 (analyzing AFCARS data over an eleven-year period to look at

### B. The Correlation Between Neglect and Poverty

Professionals in child welfare have long believed that the poorer the child, the more at-risk that child is for abuse and neglect.<sup>42</sup> Consequently, “the public child welfare system in America is populated almost exclusively by poor children.”<sup>43</sup>

That belief might be justified, on one hand. Income, or socioeconomic status (SES),<sup>44</sup> is consistently the “strongest predictor of maltreatment rates.”<sup>45</sup> One study found that family income was significantly related to incidence rates in nearly every category of maltreatment.<sup>46</sup> When comparing children whose families earned \$30,000 per year or more with those whose families earned below \$15,000 per year, the study found that the children with less family income were “more than 22 times more likely to experience some form of maltreatment under the Harm Standard”<sup>47</sup> and “over 25 times more

disproportionality rates of African Americans and Native Americans by state).

42. See Guggenheim, *supra* note 3, at 145.

43. *Poverty, Race, and New Directions in Child Welfare Policy*, *supra* note 25, at 64; accord PELTON, *supra* note 6, at 20; *Protecting Children or Punishing Mothers*, *supra* note 40, at 584.

44. “Low [SES] households were those in the bottom tier on any indicator: household income below \$15,000 a year, parents’ highest education level less than high school, or any member of the household a participant in a poverty program, such as TANF, food stamps, public housing, energy assistance, or subsidized school meals.” ANDREA J. SEDLAK ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: REPORT TO CONGRESS EXECUTIVE SUMMARY (NIS-4) 12 (2010). The latest national incidence study on child abuse and neglect “combined three indicators into a general measure of [SES]: household income, household participation in any poverty program, and parents’ education.” *Id.*

45. ANDREA J. SEDLAK ET AL., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): SUPPLEMENTARY ANALYSES OF RACE DIFFERENCES IN CHILD MALTREATMENT RATES IN THE NIS-4, at 1 (2010), available at [http://www.acf.hhs.gov/sites/default/files/opre/nis4\\_supp\\_analysis\\_race\\_diff\\_mar2010.pdf](http://www.acf.hhs.gov/sites/default/files/opre/nis4_supp_analysis_race_diff_mar2010.pdf).

46. ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP’T OF HEALTH & HUMAN SERVS., EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 9 (1996).

47. *Id.* at 9–10.

The Harm Standard was developed for the [first national incidence study], and it has been used in all three national incidence studies. It is relatively stringent in that it generally requires that an act or omission result in demonstrable harm in order to be classified as abuse or neglect. Exceptions are made in only a few categories where the nature of the maltreatment itself is so egregious that the standard permits harm to be inferred when direct evidence of it is not available. The chief advantage of the Harm Standard is that it is strongly objective in character. Its principal disadvantage is that it is so stringent that it provides a view of abuse and neglect that is too narrow

likely to suffer maltreatment of some type using the Endangerment Standard.”<sup>48</sup> The poorer children were “more than 44 times more likely to be neglected, by either definitional standard.”<sup>49</sup>

The latest data shows similar trends: “Children in low [SES] households had significantly higher rates of maltreatment in all categories and across both definitional standards.”<sup>50</sup> These children “experienced some type of maltreatment at more than [five] times the rate of other children,” and they were more than three times at risk of abuse and nearly seven times at risk of neglect.<sup>51</sup>

On the other hand, this belief that poor children are more maltreated might be biased.<sup>52</sup> According to the critical analysis of Leroy Pelton, the foster care system has historically taken children away from poor families because poverty was often believed to coincide with faulty parenthood and unworthy character.<sup>53</sup> Single motherhood in particular is perceived as bad and illegitimate.<sup>54</sup> Although these children and families may legitimately need aid,<sup>55</sup> the system’s answer was to remove

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for many purposes, excluding even many children whose maltreatment is substantiated or indicated as abuse or neglect by CPS.

*Id.* at 2.

48. *Id.* at 10.

[T]he Endangerment Standard was developed as a definitional standard during the [second national incidence study] to supplement the perspective provided by the Harm Standard. The Endangerment Standard includes all children who meet the Harm Standard but adds others as well. The central feature of the Endangerment Standard is that it allows children who were not yet harmed by maltreatment to be counted in the abused and neglected estimates if a non-CPS sentinel considered them to be endangered by maltreatment or if their maltreatment was substantiated or indicated in a CPS investigation. In addition, the Endangerment Standard is slightly more lenient than the Harm Standard concerning the identity of allowable perpetrators in that it includes maltreatment by adult caretakers other than parents in certain categories as well as sexual abuse perpetrated by teenage caretakers. The Endangerment Standard was used in both the NIS-2 and the NIS-3.

*Id.* at 3.

49. *Id.* at 10.

50. SEDLAK ET AL., *supra* note 44, at 12.

51. *Id.*

52. *Race and Child Welfare Conference*, *supra* note 17 (pointing out the greatest disparities in foster care are based on class and wealth when the vast majority of children in foster care hail from poor families).

53. PELTON, *supra* note 6, at xiii–xiv.

54. *See id.* at 101, 110 (noting the stigmatization of unwed mothers and “a deep-seated suspicion of the poor,” which guides the way that America “deal[s] with the poor”); *see also* ROBERTS, *supra* note 20, at 64–67.

55. *See* Guggenheim, *supra* note 3, at 145 (“[T]he startling number of poor children in

children from impoverished parents whose supposed deficiencies caused their poverty, thereby saving children “who would otherwise grow up to plague society.”<sup>56</sup>

That poverty has been confused and conflated with child neglect and even parental turpitude is not new.<sup>57</sup> “It is generally acknowledged that the child welfare system is heavily biased toward identifying abuse [and neglect] in lower social strata.”<sup>58</sup> According to the Supreme Court in *Smith v. Organization of Foster Families*, “foster care has been condemned as a class-based intrusion into the family life of the poor.”<sup>59</sup> Three studies conducted in 1996 found that 30% of America’s children in foster care were separated from their families because their parents lacked safe and affordable housing.<sup>60</sup> As National Public Radio highlighted in its controversial yearlong investigation and report on Native Americans in foster care in South Dakota, “what social workers call neglect, is often poverty—and sometimes native tradition.”<sup>61</sup>

Besides facing greater unwelcome intrusion into their family lives,<sup>62</sup>

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the child welfare system proves what public policy officials have long known: that children raised in severe poverty plainly need the beneficence of state aid.”); *see also Race and Child Welfare Conference*, *supra* note 17.

56. PELTON, *supra* note 6, at xiii–xiv.

57. *See* ROBERTS, *supra* note 20, at 33–34; *see also Race and Child Welfare Conference*, *supra* note 17 (noting the foster care response to capture poor children “hides the systemic reasons for poor family’s hardships by attributing them to parental deficits and pathologies that require therapeutic remedies rather than social change”).

58. David Finkelhor & Larry Baron, *High Risk Children*, in *A SOURCEBOOK ON CHILD SEX ABUSE* 60, 68–69 (David Finkelhor ed., 1986).

59. *Smith v. Org. of Foster Families*, 431 U.S. 816, 833 (1977) (recounting statistics in NYC in 1976: “over 50% of all children in foster care . . . are from female-headed families receiving [welfare]”). Discrimination against the poor, especially by judges and lawmakers, has been documented since antiquity. *See, e.g., Isaiah* 10:1–2 (King James) (dating back to approximately 700 B.C.) (condemning discrimination against the poor, and single mothers with children).

60. *See* Richard Wexler, *Take the Child and Run: How ASFA and the Mentality Behind it Harm Children*, 13 UDC/UCSL L. REV. 435, 438 (2010) (relating a fourth study that found income or housing was a more important factor than substance abuse when determining whether to leave a child in his or her own home).

61. *Incentives and Cultural Bias Fuel Foster Care*, *supra* note 14 (recounting that some social workers perceive neglect if they see families of thirty people living together in one home, per the tribe’s tradition or not finding food in the refrigerator of one home with children despite the tradition that the tribe eats together in another home, where there is food).

62. *See Protecting Children or Punishing Mothers*, *supra* note 40, at 584 (noting that the government intervenes more often in the custodial relationships of indigent families because these families lack power and resources and are not entitled to the same privacy as most Americans because they receive public assistance).

poor “[m]inority families are also more likely to turn to foster care. . . . This disproportionate resort to foster care by the poor and victims of discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families.”<sup>63</sup> Parents of color are disproportionately poor, which increases their risk of involvement in the foster care system, as explored further below.<sup>64</sup>

### C. *The National Debate on Bias in Foster Care*

So why are African American and Native American children disproportionately represented in the foster care system?<sup>65</sup> Are these children actually more maltreated or just more at risk based on the notions of the hegemony—the dominion and control of those in power in the foster care system?<sup>66</sup> Under Congressional mandate, the United

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63. *Smith*, 431 U.S. at 833–34 (pointing out that “middle- and upper-income families . . . have the resources to purchase private care”). “The poor have little choice but to submit to state-supervised child care when family crises strike.” *Id.* at 834. “The extent to which supposedly ‘voluntary’ placements are in fact voluntary has been questioned . . . many ‘voluntary’ placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent.” *Id.* (footnote omitted); see also Nathan Rott, *A Fight for Her Grandchildren Mirrors a Native Past*, NAT’L PUB. RADIO (Oct. 24, 2011, 10:51 AM), <http://www.npr.org/2011/10/25/141650809/a-fight-for-her-grandchildren-mirrors-a-native-past> (recounting one Native American woman’s story of being sent to an Indian boarding school when her mother could not afford to care for her or her sister).

64. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 7 (“Studies show that African-American families are more likely to be reported, although research indicates that this may be due, in part, to socioeconomic status and not race alone.”) (citing Dennette M. Derezotes & John Poertner, *Factors Contributing to the Overrepresentation of African American Children in the Child Welfare System*, in RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM 1, 13 (2005)); Jill C. Engle, *Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty*, 16 J. GENDER RACE & JUST. 1, 3–4 (2013) (finding that nearly forty percent of single mothers and their children subsist below the poverty line, and that poverty rates are nearly forty percent higher for women and children of color compared to Whites).

65. *Race and Child Welfare Conference*, *supra* note 17 (noting the “riddle of overrepresentation” of African American children in foster care).

66. See *id.* (posing the question of whether child protection agencies’ bias is a major factor in explaining African American and Native American overrepresentation in foster care); see also Sheila D. Ards et al., *Racialized Perceptions and Child Neglect*, 34 CHILD. & YOUTH SERVS. REV. 1480, 1482 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?aabstract\\_id=2365409](http://papers.ssrn.com/sol3/papers.cfm?aabstract_id=2365409) (summarizing the three explanations most often provided for racial disparities in child welfare: first, certain minorities have “multiple risk factors (such as single parent families, high school dropout rates, and residency in high crime areas) that predispose them to maltreat their children more than whites”; second, “children of color are often more visible than others and thus are more likely to come to the attention of child protective



States Department of Health and Human Services (DHHS) has conducted national incidence studies of child abuse and neglect (NIS) four times over thirty years in part to answer these questions.<sup>67</sup>

On the matter of race and maltreatment, the first three NIS studies found no significant race differences in the incidence of maltreatment or maltreatment-related injuries.<sup>68</sup> In other words, when controlled for SES, African Americans and Native Americans were not more maltreated than Whites. Yet, for almost thirty years the disproportion existed and has been well documented in social science and child welfare policy research.<sup>69</sup>

The fourth NIS study, however, did find racial differences with “[African American] children experiencing maltreatment at higher rates than White children in several categories.”<sup>70</sup> Published in 2010, the NIS-4 reported that “[African American] children were at significantly greater risk than White children of experiencing physical abuse under both the Harm and Endangerment Standards, but in both cases, this

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service workers and those involved in the child welfare system”; and third, “*systemic racism or unconscious discrimination*”).

67. WESTAT, INC., 4TH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: PROJECT SUMMARY, NIS-4, at 1, (2008), *available at* <https://www.nis4.org/DOCS/ProjectSummary.pdf> asp. The first NIS (NIS-1) was reported in 1981, NIS-2 in 1988, NIS-3 in 1996, and NIS-4 in 2010. *Id.* Intended to serve as the “nation’s needs assessment on child abuse and neglect,” and to be a “unique perspective on the scope of the problem,” the NIS data not only includes children who were investigated by CPS agencies, but also children who were not reported to CPS or who were screened out by CPS without investigation but recognized as maltreated by community professionals. SEDLAK ET AL., *supra* note 44, at 1. The NIS’s methodology involves a survey of CPS Agencies, as well as “Non-CPS Sentinels,” which are “[c]ommunity professionals in specific categories of agencies with regular, direct child/family contact, giving data about all children they encounter during the study period whom they suspected to be victims of maltreatment.” *See* ANDREA J. SEDLAK, WESTAT, INC., A HISTORY OF THE NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 7 (2001), *available at* [http://www.nis4.org/nis\\_history.pdf](http://www.nis4.org/nis_history.pdf). The professionals represented law enforcement (police, sheriffs, and juvenile probation officers); medical services (hospitals and public health departments); education (public schools); and other services (mental health, day care, and voluntary social services). *Id.*

68. SEDLAK & BROADHURST, *supra* note 46, at 7; *see also Race and Child Welfare Conference*, *supra* note 17 (discussing the origin of the “no difference” hypothesis in child maltreatment rates across races).

69. *See supra* notes 26–41 and accompanying text; *see also* Ards et al., *supra* note 66, at 1482 (noting the implication that the racial disparities were due to reporting bias and not underlying abuse, but also noting that “reporting bias does not appear to be the cause of the overrepresentation of blacks among those abused and neglected” (citing Ards et al., *The Effects of Sample Selection Bias on Racial Differences in Child Abuse Reporting*, 22 CHILD ABUSE & NEGLECT 103 (1988))).

70. SEDLAK ET AL., *supra* note 45, at 1.

race difference depended on SES.”<sup>71</sup> “The study’s authors suggest that the findings are at least partly a consequence of the greater precision of the NIS-4 estimates and partly due to the enlarged gap between [African American] and White children in economic well-being, since socioeconomic status is the strongest predictor of maltreatment rates.”<sup>72</sup> Interestingly, the race difference was small or nonexistent among children living in the poorest homes with the lowest SES households.<sup>73</sup>

### 1. The Racial Justification Movement

There are those who believe that African American and Native American children are represented in foster care at higher rates because these “children are disproportionately victimized by abuse and neglect.”<sup>74</sup> Mere disproportionality of minorities in foster care is not itself evidence of discrimination, they argue, but rather reflects official maltreatment rates.<sup>75</sup> These official maltreatment rates, according to Professor Bartholet, demonstrate “real differences in the underlying incidence of maltreatment, and that black children are actually at significantly higher risk than white children for serious maltreatment.”<sup>76</sup> The statistical disparities therefore are rational and the risk of harm to children in removal and placement into foster care is outweighed by the greater risk of harm of maltreatment if left at home.<sup>77</sup> This camp relies on evidence indicating that African American children in particular “suffer worse outcomes from maltreatment, including higher rates of death following child abuse, higher rates of death following traumatic brain injury, and higher rates of mortality among those referred to child welfare.”<sup>78</sup>

Often, African American and Native American families live in enclaves characterized by segregation and poverty in which “[high] crime, substance abuse, unemployment, and limited community

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71. *Id.*

72. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 2–3 (citing SEDLAK ET AL., *supra* note 45).

73. See SEDLAK ET AL., *supra* note 45, at 2 (noting the race difference increases for children in more privileged households).

74. *False Facts and Dangerous Directions*, *supra* note 4, at 923.

75. *Id.* at 874.

76. *Race and Child Welfare*, *supra* note 4, at 2.

77. Child protection ideologies, *infra* Part IV.C, should drive practices, under this movement’s rhetoric.

78. *Race and Child Welfare*, *supra* note 4, at 3.

services” are prevalent.<sup>79</sup> According to Pelton, poverty is a big indicator for potential child abuse and neglect because the environments and contexts in which impoverished people must live create inherent dangers for children, even though the consequent abuse or neglect may not be intentional.<sup>80</sup> Professor Randall Kennedy, on the other hand, has noted that:

[G]iven the history of race and racism, given the deplorable conditions suffered disproportionately by [African American] families—conditions that produce high rates of substance abuse and other self-destructive behavior—it would be surprising if [African American] children did not have higher rates of contact with the child welfare system than white children.<sup>81</sup>

Whether or not parental deficiencies are causal factors, according to the Child Welfare Information Gateway, the fact remains that “[c]ertain risk factors that disproportionately affect families of color, such as poverty and parental incarceration[] may lead to their disproportional contact with the child welfare system.”<sup>82</sup>

## 2. The Racial Disproportionality Movement

On the other side of the debate, the Racial Disparity Movement,<sup>83</sup> are those who argue that the disproportionate representation of African Americans and Native Americans in foster care evinces bias.<sup>84</sup> For them, foster care manifests the vestiges of slavery and a history of

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79. *Id.* at 2 (referencing history by Racial Disproportionality Movement proponents).

80. PELTON, *supra* note 6, at 41–42 (noting the dangers poor families regularly encounter including high-crime neighborhoods, hazardous dwellings replete with faulty wiring, lead paint, and no heat). Not only do these conditions stress even the hardest parents, but they also cause direct dangers to their children. *Id.*

81. *Race and Child Welfare*, *supra* note 4, at 2.

82. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 5 (citing Alice M. Hines et al., *Factors Related to the Disproportionate Involvement of Children of Color in the Child Welfare System: A Review and Emerging Themes*, 26 CHILD. & YOUTH SERVS. REV. 507, 508–09 (2004)).

83. The other movement has bestowed this moniker. See *False Facts and Dangerous Directions*, *supra* note 4, at 873.

84. See *Race and Child Welfare*, *supra* note 4, at 2 (highlighting remarks by Professors Dorothy Roberts and Randall Kennedy that African American families have historically been plagued by racial discrimination and economic injustice). *But see False Facts and Dangerous Directions*, *supra* note 4, at 920–21 (arguing that if any discrimination exists, it is towards White children who are underrepresented in a system that is “guilty of underintervention”).

discrimination in this country.<sup>85</sup> As Professor Charles Lawrence has noted, “Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.”<sup>86</sup> He adds that “[b]ecause of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites.”<sup>87</sup>

Unconscious racism<sup>88</sup> is embedded in our civic institutions;<sup>89</sup> and the foster care system is vulnerable as one such institution controlled and influenced by those in power.<sup>90</sup> Those in power in turn may unwittingly discriminate against people of color,<sup>91</sup> which history demonstrates.<sup>92</sup>

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85. *Race and Child Welfare*, *supra* note 4, at 2; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (noting the historic and ongoing patterns of racial discrimination and economic injustice that continue to affect African American families).

86. Lawrence, *supra* note 85, at 322.

87. *Id.*

88. *Id.* (“We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”).

89. See Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 90 (1994) (“[A]ll [of] our institutions of education and information—political and civic, religious and creative—either knowingly or unknowingly provide the public rationale to justify, explain, legitimize, or tolerate racism.” (alteration in original) (quoting DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 156 (1987)) (internal quotation marks omitted)) (discussing Professor Manning Marabel’s “ideological hegemony” of white racism).

90. See *id.* (“[E]xploring the ‘hegemonic role of racism,’ . . . that racism is a central ideological and political pillar upholding existing social conditions.” (quoting Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988))); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2367 (2003) (“[C]ritical race theory has concerned itself with how race is constructed through unconscious bias and institutional structures.”).

91. See Lawrence, *supra* note 85, at 322 (arguing that since racism is so deeply ingrained in our culture and is transmitted by tacit understandings, it is difficult to eradicate); Brooks, *supra* note 89, at 91 (defining “racism as embracing both a state of mind (the belief in white supremacy)—what is traditionally called ‘racism’—and facially neutral practices or customs that have a discriminatory effect—what is traditionally called ‘discrimination’”) (citing race scholar ANTHONY DOWNS, U.S. COMM’N ON CIVIL RIGHTS, RACISM IN AMERICA AND HOW TO COMBAT IT 6 (1970)).

92. See Eleanor Marie Brown, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and “Mainstream” Civil Rights Scholarship*, 105 YALE L.J. 513, 519 (1995) (“Critical race theory challenges ahistoricism and insists on a contextual/historical analysis of the law. . . . [W]e adopt a stance that presumes that racism has contributed to all contemporary manifestations of group advantage and disadvantage along racial lines. . . . Our history calls for this presumption.” (emphasis omitted) (quoting Charles R. Lawrence III et

*a. African American History in Foster Care*

A century ago foster care in America was a White-only institution.<sup>93</sup> In order to save the children, then-progressive reformers like Jane Adams sought to take European immigrant children from their impoverished homes and send them to rural areas to be cared for by strangers.<sup>94</sup> African American children were ignored by this segregated system, and they were either left to fend for themselves or left for their communities to handle.<sup>95</sup>

Once African American children entered foster care during the 1950s, their numbers soared.<sup>96</sup> According to some, it was no coincidence that foster care policies became more punitive precisely when African American children entered the system.<sup>97</sup> As the number of White children in the child welfare system fell and the child welfare system became increasingly populated by African Americans, state governments “spent more money on out-of-home [foster] care and less on in-home [family] services.”<sup>98</sup> For example, in the California child welfare system during the late 1980s and early 1990s, the percentage of children receiving in-home “family maintenance” services fell five percent, while foster care caseloads doubled.<sup>99</sup> Some scholars find these concurrent shifts in foster care population and services provided to be no mere coincidence.<sup>100</sup>

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al., *Introduction*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1, 6 (Mari J. Matsuda et al. eds., 1993)).

93. See ROBERTS, *supra* note 20, at 14; *Race and Child Welfare Conference*, *supra* note 17.

94. See *Race and Child Welfare Conference*, *supra* note 17.

95. See ROBERTS, *supra* note 20, at 7; *Race and Child Welfare Conference*, *supra* note 17 (noting how African American women formed clubs to create alternatives to the juvenile justice system).

96. PELTON, *supra* note 6, at 20 (noting how foster care populations grew once African Americans, who were often poor, were included); ROBERTS, *supra* note 20, at 7–8; see also *Race and Child Welfare Conference*, *supra* note 17.

97. See *Race and Child Welfare Conference*, *supra* note 17 (noting the main and often only service offered by the child welfare system to African American and Native American families is foster care).

98. ROBERTS, *supra* note 20, at 15.

99. *Id.*

100. See *id.* at 15, 32 (noting how African American neighborhoods, especially poor ones, are under the greatest surveillance); PELTON, *supra* note 6, at 19–20.

*b. Native American History in Foster Care*

This country has long persecuted Native Americans,<sup>101</sup> and our history of destroying these families remains a terrible blight.<sup>102</sup> Heralded as the Boarding School era that lasted over 100 years,<sup>103</sup> many Native American children were involuntarily rounded up, removed from their families, and sent hundreds of miles away to boarding schools.<sup>104</sup> As part of the federal government's assimilation policy, the children were forbidden from speaking their own languages, wearing their own traditional clothing, and practicing their own religions.<sup>105</sup> Their parents were either not allowed to visit them or were too poor to travel the long distances.<sup>106</sup>

In order to "Christianize and civilize" Native American children, the rationale for the Boarding School movement was to strip children of their Native American identity.<sup>107</sup> "Kill the Indian, Save the Man" was the reigning motto.<sup>108</sup> But these boarding schools failed to save these

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101. Nat'l Child Welfare Res. Ctr. on Legal & Judicial Issues, *Indian Child Welfare Act: What Parents' Attorneys Need to Know, Part 1—Overview*, AM. B. ASS'N, [http://www.americanbar.org/groups/child\\_law/what\\_we\\_do/projects/rcjji/icw.html](http://www.americanbar.org/groups/child_law/what_we_do/projects/rcjji/icw.html) (last visited Nov. 7, 2013) [hereinafter NRC WEBINAR] (follow "Audio or Slides" hyperlinks for "Part 1—Overview" under ICWA Webinars). Since the onslaught of European settlers in Northern America, Native American people have endured infectious diseases and a federal government that tried to rid this country of its so-called "Indian problem." *Id.* Military forces and coercive treaties pushed Native American tribes westward and imprisoned and publicly hanged many Native Americans. *Id.*

102. *Id.* (relating how the genocide of the Native American peoples is not taught to schoolchildren in U.S. history but tribes have not forgotten).

103. *Id.*; see also LEWIS MERIAM ET AL., THE INST. FOR GOV'T RESEARCH., THE PROBLEM OF INDIAN ADMINISTRATION 11 (1928); Marsha King, *A Lesson in Healing—Indian Boarding Schools: Tribes Confront Painful Legacy*, SEATTLE TIMES, Feb. 3, 2008, at A1 ("The boarding school era began in the late 1800s and continued at its most oppressive through the 1920s, when the federal government forcibly placed tribal children in the harsh, militarylike institutions in an effort to assimilate them into the dominant culture."); Rott, *supra* note 63 (recounting one grandmother's story in one such boarding school).

104. NRC WEBINAR, *supra* note 101; *Native Foster Care*, *supra* note 18.

105. Rott, *supra* note 63 ("No speaking in the native Lakota language, no gathering in groups larger than two, no talking back."); *Native Foster Care*, *supra* note 18 (providing the cultural and historical background leading up to Congress's enactment of the Native American Child Welfare Act); see also *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 n.1 (1989).

106. NRC WEBINAR, *supra* note 101.

107. *Id.*; see also MERIAM ET AL., *supra* note 103, at 21.

108. *Native Foster Care*, *supra* note 18; see also MERIAM ET AL., *supra* note 103, at 21 (recommending that Native Americans be absorbed into civilization in order to live in accordance with it); NRC WEBINAR, *supra* note 101 (relating how tribes were not destroyed completely but suffered unspeakable damage).

children and instead mistreated them, studies showed.<sup>109</sup> After Congress investigated the Boarding School era, the *Meriam Report*<sup>110</sup> found these boarded Native American children were malnourished, overworked, poorly educated, and harshly punished in military-style institutions.<sup>111</sup> Trained to become maids or farm laborers, these boarding schools offered no semblance of home life.<sup>112</sup> During this era, thousands of Native American children were also adopted through the Native American Adoption Project, funded by the Children's Bureau, which placed these children in non-Native American families.<sup>113</sup>

### 3. The Import of History for Foster Care

Based on this history, critics of the foster care system eschew the latest statistics that suggest a racial maltreatment gap does exist (i.e., African American and Native American children are at greater risk for maltreatment).<sup>114</sup> Because unconscious racial bias affects us all and is

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109. See King, *supra* note 103; *Native Foster Care*, *supra* note 18; NRC WEBINAR, *supra* note 101.

110. MERIAM ET AL., *supra* note 103, at vii, x.

111. NRC WEBINAR, *supra* note 101 (relating findings from the *Meriam Report*); King, *supra* note 103 (some children were raped and many died); *Native Foster Care*, *supra* note 18.

112. NRC WEBINAR, *supra* note 101; King, *supra* note 103; see also MERIAM ET AL., *supra* note 103, at 375. This "boarding school" experience is not unique to Native Americans. Some African American foster children in Alabama in the 1960s were sent to reform schools with similarly grotesque conditions where they did not receive any proper education, but rather were forced to provide free farm labor to wealthy landowners in Montgomery. DENNY ABBOTT ET AL., *THEY HAD NO VOICE: MY FIGHT FOR ALABAMA'S FORGOTTEN CHILDREN* 24–25 (2013).

113. Miss. *Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989); NRC WEBINAR, *supra* note 101.

114. See Ards et al., *supra* note 66, at 1482 (citing several studies that suggest the explanation for black overrepresentation in foster care is "systemic racism or unconscious discrimination. . . . This view suggests that whether consciously or unconsciously, child protective service workers charged with the responsibility of investigating allegations of abuse or neglect, reach racially disparate conclusions about these allegations" (internal citations omitted)). Cf. Moran, *supra* note 90, at 2367 ("Rather than worry about whether statistical discrimination is rational, critical race theorists question whether it is just."). Proponents of the foster care system (or the Racial Justification Movement) and its prevailing paradigm of "child protection" do not necessarily deny the history of discrimination towards racial minorities in foster care:

Obviously, [African American] parents are neither *inherently* more likely to abuse and neglect their children than whites, nor *inherently* more likely to be associated with poverty, single parenting, substance abuse, and other risk factors associated with child maltreatment. They are victims of historic and ongoing racial and economic injustice that has put them in a seriously disadvantaged position in our society.

widely acknowledged in foster care,<sup>115</sup> these critics (usually from the Racial Disproportionality Movement) contend the NIS-4 data indeed shows a racial difference in how community professionals, including Child Protective Services (CPS) workers, perceive maltreatment across racial lines.<sup>116</sup> Instead of measuring actual differences in maltreatment across racial categories—the data is actually measuring racial bias.<sup>117</sup>

Institutional players, this movement argues, simply cannot operate in an objective, neutral, bias-free, colorblind manner.<sup>118</sup> To think otherwise assumes that the system works adequately and that the numbers accurately reflect actual rates of maltreatment, without looking at the historical evidence to the contrary.<sup>119</sup> Official sources of information include police, prosecutors, social welfare departments, hospitals, school officials, and “[p]olice and prosecutors typically became primary sources in these situations, which reinforces a tendency to recount the events in terms of individual blame and child martyrdom.”<sup>120</sup>

Besides history, these race critics point to evidence of the

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*False Facts and Dangerous Directions*, *supra* note 4, at 877. But these proponents place full faith into the latest research. See *supra* notes 68–76 and accompanying text.

115. See, e.g., *Protecting Children or Punishing Mothers*, *supra* note 40, at 584–85 (describing how child protection agencies nationwide target poor mothers of color); *Race and Child Welfare Conference*, *supra* note 17 (acknowledging bias might account for individual decisions).

116. Azar & Goff, *supra* note 27, at 535–36 (“Much evidence exists that there is overrepresentation and differential treatment of children and families from racial and ethnic minorities within CPS. . . . The data . . . cannot be considered in isolation, but rather must be seen in light of larger inequities that occur generally within society.” (footnote omitted)); see Ards et al., *supra* note 66, at 1480 (conducting a study on racialized perceptions of child welfare workers and finding a “strong and statistically significant” impact “on racial disproportionalities in reported and substantiated maltreatment rates”). “The one aspect of the chain of events over which caseworkers have the largest control—investigation and substantiation—is the one area that we find is the most consistently related to racialized beliefs and perceptions.” *Id.* at 1488.

117. Compare Azar & Goff, *supra* note 27, at 535–36, with *False Facts and Dangerous Directions*, *supra* note 4, at 920 (arguing “no persuasive evidence [shows] that child welfare decision-making is systematically biased in the sense that it is more likely to report, substantiate, and remove black children, as compared to similarly situated white children”).

118. See Woodhouse, *supra* note 4, at 525 (“A . . . myth is that we are a colorblind society. . . . Race is always a volatile issue in discussions of child welfare policy, but empirical studies of the effects of race in less controversial contexts provide proof that race matters in even the most ordinary interactions.”).

119. See Azar & Goff, *supra* note 27, at 535.

120. Fraidin, *supra* note 21, at 16 (quoting Nina Bernstein, *Press Coverage and Public Perception*, 54 NIEMAN REPS., Winter 2008, at 83) (internal quotation marks omitted). Often these “official sources” focus on one incident and ignore contextual information. *Id.* at 16 n.117.



destruction of African American and Native American families that continues today.<sup>121</sup> African American neighborhoods, especially poor ones, are under the greatest surveillance.<sup>122</sup> In some areas of the country, Native Americans are under scrutiny, even on their own supposedly sovereign tribal lands.<sup>123</sup> Known as the racial geography of foster care, those neighborhoods with poor African American and Native American families and the greatest involvement and concentration of foster care system surveillance are a perfect match.<sup>124</sup>

Stereotypes of Native Americans as alcoholics, drug addicts, and gamblers underlie current agency decisions to remove Native American children from their homes.<sup>125</sup> Impoverished African American mothers are often dubbed “welfare queens” and foster care professionals presume them unfit to parent.<sup>126</sup> These stereotypes and labels stick, and caseworkers, lawyers, and judges use them to justify ongoing supervision of these parents and their children.<sup>127</sup> To compound the problem, Native American and African American families distrust the system, which can affect their participation in it, and to make matters worse, what professionals perceive as lax parental attitudes might really be

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121. See, e.g., *Incentives and Cultural Bias Fuel Foster Care System*, *supra* note 14 (noting how the Crow Creek Tribe, with only 1,400 members, saw thirty-three of its children taken into foster care over the past few years); *Native Foster Care*, *supra* note 18.

122. See *Protecting Children or Punishing Mothers*, *supra* note 40, at 584; *Race and Child Welfare Conference*, *supra* note 17; RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30, at 22, 29. *But see False Facts and Dangerous Directions*, *supra* note 4, at 906 (debunking the “visibility bias” theory in which racial minorities are more likely to be reported because they are disproportionately poor and therefore exposed to CPS and other non-CPS sentinels as lacking empirical support).

123. See *supra* note 121.

124. See RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30, at 22.

125. NRC WEBINAR, *supra* note 101 (relating how Native Americans families in which alcohol or substance abuse is alleged are treated more harshly); cf. Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 104–06 (1990) (“At other times, society disseminates images of [African Americans] as primitive and bestial, of Mexicans as lazy, happy-go-lucky, untrustworthy or unclean, of Asians as aloof and manipulative. Although designed to serve different purposes, they all converge on the idea that nonwhites deserve inferior treatment because they *are* actually inferior.” (footnote omitted)).

126. ROBERTS, *supra* note 20, at 65; see also Roberts, *supra* note 16, at 1619 (“The U.S. welfare state provides stingy benefits to poor mothers, who are stigmatized and encumbered by behavioral regulations.”).

127. *Poverty, Race, and New Directions in Child Welfare Policy*, *supra* note 25, at 64 (“Despite family preservation programs an alarming number of poor [African American] children continue to pour into the foster care system, and the state continues to supervise their families.”).

differences in social interaction.<sup>128</sup>

This master narrative of deviant African American and Native American parents and their victimized children fuels the system.<sup>129</sup> But when subjective decisions characteristic of the foster care system are coupled with enduring stereotypes of Native Americans and African Americans, these children are most at-risk not for abuse and neglect, but for unjustified removals and prolonged separations from their families.<sup>130</sup> For those in this camp, there is no riddle of overrepresentation of these children in foster care;<sup>131</sup> African Americans “get the short end of the stick on every indicia of social well-being: life span, morbidity, incarceration, education, victimization by crime, income, wealth, you name it!”<sup>132</sup> With a history of slavery and segregation plaguing these populations, they continue to experience “fresh bias” or “fresh racism” today in their disparate treatment by the foster care system.<sup>133</sup>

Regardless of the perspective, researchers admit they do not actually know why the race and class disparities exist in foster care and they are reluctant to provide answers; the data only raises questions that warrant further study.<sup>134</sup> That means either narrative is possible (minorities are maltreated more or minorities are impacted more) and in some instances, either or both might explain the phenomenon.<sup>135</sup>

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128. NRC WEBINAR, *supra* note 101 (emphasizing the critical need to be aware at the same time of stereotypes versus cultural differences).

129. Fraidin, *supra* note 21, at 2–3 (“In short, the master narrative of child welfare depicts foster care as a haven for ‘child-victims’ savagely brutalized by ‘deviant’ [and] ‘monstrous’ parents.” (footnotes omitted)). “According to media portrayals and popular understanding, child abuse is brutal violence; children are innocent victims; parents are deviant and monstrous; and children must be separated from [their] parents for their protection. The narrative dovetails with pernicious, longstanding stereotypes of people of color, especially African-Americans.” *Id.* at 8 (footnote omitted); *see also* Chris Gottlieb, *Reflections on Judging Mothering*, 39 U. BALT. L. REV. 371, 382 (2010).

130. *See infra* Parts II.D, IV.C.

131. *See supra* note 59 and accompanying text.

132. *Race and Child Welfare Conference*, *supra* note 17 (remarks by Professor Randall Kennedy).

133. *See Race and Child Welfare*, *supra* note 4, at 2; *Race and Child Welfare Conference*, *supra* note 17.

134. *Child Welfare, Race, and Disparity: New Findings, New Opportunities*, CHAPIN HALL UNIV. CHI. (Feb. 9, 2012), <http://www.chapinhall.org/child-welfare-race-and-disparity-new-findings-new-opportunities> (providing webcast recordings and PowerPoint presentations).

135. *See Smith v. Org. of Foster Families*, 431 U.S. 816, 838 n.41 (1977) (noting how the competing narratives of the natural parents and the foster parents of the foster-care system

#### D. The Secondary Harms of Foster Care

What researchers do know, definitively, is that although designed in theory to protect children, the foster care system actually harms many children.<sup>136</sup> “Everyone agrees that foster care is overburdened and often damages children more than raising them in either their biological families or adoptive homes.”<sup>137</sup> Although intended to provide *temporary* care to children and their families, in fact many children stay in foster care for years.<sup>138</sup> Once in foster care, the system often moves these children from placement to placement, with many experiencing three or more moves.<sup>139</sup>

Numerous studies now demonstrate the harms of foster care itself. In 2007, for example, MIT Professor and researcher Joseph Doyle studied the outcomes of school-age children assigned to investigators with high removal rates and found that those children were more likely to be placed in foster care and had higher delinquency rates, teen birth rates, homelessness, physical/developmental/mental health problems, lower earnings, and were more likely to need public assistance and experience substance abuse problems.<sup>140</sup>

In another longitudinal study of 189 children and families from Minnesota, researchers examined the impact of foster care placement on the development of behavior problems, the consequences of foster care placement were decidedly negative.<sup>141</sup> Researchers found that:

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contain “elements of truth” “[b]ut neither represents the whole truth about the system”).

136. *Protecting Children or Punishing Mothers*, *supra* note 40, at 578 (“[A]lthough such treatment is in the name of child protection, children too often experience other harms as a result of and while in protective care.”); Daryl L. Bell-Greenstreet, *Foster Care Review Board Fails in its Duty Toward Children*, ARIZ. REPUBLIC, May 2, 1995, at B4 (calling a stay in foster care more dangerous than being a fighter pilot).

137. ROBERTS, *supra* note 20, at vi.

138. Compare CRAIG & HERBERT, *supra* note 2, at 3 (citing 1993 data from the American Civil Liberties Union that one in four children who enter foster care stayed there on average for four years or more, and one in ten stayed in foster care for longer than seven years), with AFCARS REPORT, *supra* note 29, at 2 (reporting data almost twenty years later that the average length of stay in foster care was almost two years with nine percent (34,388 children) staying in care for five years or more).

139. CRAIG & HERBERT, *supra* note 2, at 3 (reporting in FY 1990, thirty percent of foster children experienced three or more different placements (foster and group homes and shelters) in the preceding three years); see also ROBERTS, *supra* note 20, at vi (reporting disparate treatment in placement moves for African American children especially).

140. See Doyle, *supra* note 8, at 1583–84, 1607.

141. Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 57, 60, 71 (2006), available at <http://fixcas.com/scholar/impact.pdf>.

Controlling for developmental adaptation and SES prior to placement, the results support a general view that foster care may lead to an increase in behavior problems that continues after exiting the system. . . . [A]s foster care necessitates a significant disruption in the caretaking environment of children who have likely experienced adverse circumstances prior to placement.<sup>142</sup>

By comparing three groups of children: children who experienced foster care, children who were maltreated but remained in the home where they received services, and children who had not experienced foster care or maltreatment despite the presence of at-risk demographic factors, researchers found that those children placed in foster care exhibited significant behavior problems when compared to children who received adequate care in the home.<sup>143</sup> Compared to those maltreated children left at home or placed with familiar caregivers, those children placed in stranger foster care showed higher levels of internalizing problems.<sup>144</sup> These problems can extend for years after a child leaves the system, as Craig and Herbert note, and “children who turn age 18 in care are overrepresented among welfare recipients, prison inmates and the homeless.”<sup>145</sup>

For children of color in foster care, it gets worse: they suffer disparate treatment.<sup>146</sup> Not only does the research clearly demonstrate

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142. *Id.* at 71.

143. *Id.* at 60–61, 71.

144. *Id.* at 71.

145. CRAIG & HERBERT, *supra* note 2. Four years after leaving foster care, almost fifty percent of youths had not graduated from high school, almost forty percent had not held a job for over a year, twenty-five percent had experienced homelessness for at least one night, and sixty percent of women had delivered a child. *Id.* at 5; *see also Race and Child Welfare, supra* note 4, at 2 (“Even when removal represents important protection against maltreatment, children subjected to both maltreatment and the disruption caused by removal to foster care confront real short- and long-term risks to their well-being, including risks for future unemployment, crime, imprisonment, homelessness, substance abuse, and maltreatment of the next generation.”); ABBOTT ET AL., *supra* note 112, at 88 (finding in a follow-up study of nearly forty children who spent time in Mt. Meigs in Montgomery, Alabama that two were currently on death row, and several more were serving life sentences for crimes they committed as adults).

146. *See* John Fluke et al., *A Research Synthesis on Child Welfare Disproportionality and Disparities*, in *DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH* 1, 8–9 (2011), available at [http://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare\\_An-Analysis-of-the-Research-December-2011.pdf](http://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf) (comparing and contrasting several definitions of the terms of

that children of color are disproportionately represented in foster care, but according to Patrick McCarthy, President and CEO of The Annie E. Casey Foundation:

We also know from that same body of research that alarming racial disparities exist . . . for kids of color in the child welfare system. Relative to white children, kids of color are more likely to drift in care, less likely to be reunited with families, . . . less likely to find a permanent family and more likely to have poor educational, social, behavioral, and other outcomes.<sup>147</sup>

In 2002, the data showed that African American children were the least likely of all races to exit foster care and reunify with their families.<sup>148</sup> “[W]hile the average stay in foster care for White children at the end of FY 2003 was approximately 24 months,” according to the Child Welfare Information Gateway, “the average length of stay for African-American children at the same time was more than 40 months.”<sup>149</sup>

Indeed, the disparities that African American and Native American children experience once in the system are so great that the Casey-Center for the Study of Social Policy Alliance for Racial Equity called the racial/ethnic inequities a “chronic crisis.”<sup>150</sup> Besides being reported, investigated, and removed from their homes more often for suspicions

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art “disparity” in the research literature and concluding with Myers’ definition of discrimination as “the unequal treatment of identically situated groups”).

147. McCarthy, *supra* note 4, at v; accord ROBERTS, *supra* note 20, at vi; CRAIG & HERBERT, *supra* note 2, at 4 (citing research from The Chapin Hall Center for Children at the University of Chicago that found, after controlling for variables, African American children “could be expected to stay in foster care 32 percent longer than white children. In California, [African American] children could be expected to stay 41 percent longer”); see also ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 13 (“Once they have been removed from their homes, they are more likely to remain in care and less likely to be reunited with their families than are White children.”); RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30, at 7–8 (graphing AFCARS Case Files data from 2000).

148. ROBERTS, *supra* note 20, at vi; RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30 (charting AFCARS Case Files data from 2000).

149. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 4 (citing Memorandum from Emilie Stoltzfus, Specialist in Soc. Legislation., Cong. Research Serv., to Hon. Charles Rangel, on Race/Ethnicity and Child Welfare (Aug. 25, 2005)). “Some of this disparity may be attributed to the trend for African-American children to spend more time in foster care with relatives, but that practice does not account for the enormity of the gap.” *Id.*

150. THE CTR. FOR CMTY. P’SHPIS. IN CHILD WELFARE OF THE CTR. FOR THE STUDY OF SOC. POLICY, PLACES TO WATCH: PROMISING PRACTICES TO ADDRESS RACIAL DISPROPORTIONALITY IN CHILD WELFARE 7 (2006) [hereinafter CTR. FOR CMTY. P’SHPIS.]; RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30, at 10.

of abuse and neglect, these children are less likely to receive the mental health services they need in foster care; are more likely to have fewer visits with their parents and siblings; are less likely to receive services designed to reunify them with their family; are less likely to have contact with their foster care caseworkers; and are more likely to see their parents' rights to maintain a relationship with them terminated.<sup>151</sup> "It is no surprise that [these children] are less prepared to succeed in life."<sup>152</sup>

### III. AMERICA'S FOSTER CARE LAWS

Congress has responded to trends in foster care data by enacting laws to remedy historical discrimination in foster care while at the same time trying to protect children truly at risk. But the legal standards are either not applied or are too vague, thereby inviting unintended racial bias.

#### *A. Laws Intended to Remedy Historical Discrimination*

Recognizing the historical evils inflicted on tribal nations, Congress enacted the Indian Child Welfare Act (ICWA)<sup>153</sup>:

[ICWA] was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement,

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151. RACIAL GEOGRAPHY OF CHILD WELFARE, *supra* note 30, at 9; ROBERTS, *supra* note 20, at vi; ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 9 ("Once maltreatment has been substantiated, White families are more likely to receive services that allow the children to remain in the home, while families of color are more likely to have their children placed in out-of-home care. Differences can also be found in other types of services, including those for children and those for parents.") (citing Derezotes & Poertner, *supra* note 64). *But see False Facts and Dangerous Directions*, *supra* note 4, at 920.

152. McCarthy, *supra* note 4, at v ("It's fair to say that these disparities in outcomes line up all too well with the disparities in outcomes seen in other arenas, such as poverty, housing, employment, and the criminal justice system."). Kafkaesque experiences disproportionately affect people of color in other American legal institutions like juvenile justice and criminal justice. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2, 11 (2010); Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives That Work*, 13 UDC/DCSL L. REV. 71, 71-72 (2010).

153. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. § 1901 *et seq.*).

usually in non-Indian homes.<sup>154</sup>

ICWA specifically defines Native American children's best interests vis-à-vis their own family and tribes.<sup>155</sup> The best interests of Native American children are inherently tied to the concept of belonging.<sup>156</sup> Despite such recognition and even protection for Native American families under law, these laws are not applied.<sup>157</sup> Native American children are still removed and severed from their families at great

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154. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); *see also* H.R. REP. NO. 95-1386, at 9 (1978) (noting the disparity in placement rates for Native Americans was “shocking” and that “[t]he Federal boarding school and dormitory programs also contribute[d] to the destruction of Indian family and community life”).

155. NRC WEBINAR, *supra* note 101, at 4:17 (“The ICWA intended to protect the long term best interests of [Native American] children, by maintaining the integrity of the Tribal family, the extended family, and the child’s Tribal relationship.”).

156. *Id.*

157. *Incentives and Cultural Bias Fuel Foster Care System*, *supra* note 14 (reporting how several Native American families lost their children to foster care despite ICWA’s mandate to keep children with their tribe and providing an overview and timeline of the federal act); Ethoma, *Indian Child Welfare Act: Still Under Siege*, LIFTING THE VEIL BLOG (Sept. 27, 2012), <http://liftingtheveil.blog.com/2012/09/27/indian-child-welfare-act-still-under-siege/> [hereinafter *ICWA Still Under Siege*] (“Notwithstanding the fact that the Indian Child Welfare Act (ICWA) was passed in 1978, full compliance with the Act remains elusive, . . . .” (quoting WASH. STATE RACIAL DISPROPORTIONALITY ADVISORY COMM., RACIAL DISPROPORTIONALITY IN WASHINGTON STATE: REPORT TO THE LEGISLATURE, CHAPTER 465, LAWS OF 2007 (SHB 1472) 17 (2010))). In a recent case before the U.S. Supreme Court, the Court declined to find that ICWA applied to a Native American, unwed father because he was never a custodial parent to his Native American daughter who was adopted by non-kin, non-tribal foster parents. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2555 (2013). Critics bemoan the Court’s decision as “miss[ing] the core concept behind ICWA—which is to protect the cultural resource and treasure that are Indian children, . . . [i]t’s not about protecting so-called traditional or nuclear families. It’s about recognizing the prevalence of extended families and cultures.” Rob Capriccioso, *Supreme Court Thwarts ICWA Intent in Baby Veronica Case*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (June 25, 2013), <http://indiancountrytodaymedianetwork.com/2013/06/25/supreme-court-thwarts-icwa-intent-baby-veronica-case-150103> (quoting Chris Stearns, a Navajo lawyer); Steve Russell, *White Power Day, June 25: Baby Veronica and SCOTUS Decisions*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (July 19, 2013), <http://indiancountrytodaymedianetwork.com/2013/07/19/baby-veronica-decision-and-other-supreme-court-rulings-makes-june-25-2013-white-power-day> (arguing the high Court crippled ICWA and also gutted the Voting Rights Act on the same “day the Supreme Court took a vigorous public stand for white power”). *But see* Suzette Brewer, *Supreme Court Reverses, Remands Baby Veronica Case Back to South Carolina*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (June 26, 2013), <http://indiancountrytodaymedianetwork.com/2013/06/26/supreme-court-reverses-remands-baby-veronica-case-back-south-carolina-150121> (quoting law professor Martin Guggenheim, who limits the Court’s holding to “unwed birth fathers who do not take the steps required to acquire parental rights will not benefit from the provisions in ICWA”).

rates.<sup>158</sup> Some jurisdictions utterly disregard the federal law's protection for the sanctity of these families, while others apply biased practices to find Native American parents unfit, and still others offer stock services to a family that do not meet its needs.<sup>159</sup> For all these reasons and others, compliance under ICWA remains a problem that contributes to the disproportionality and disparity that Native Americans in foster care experience.<sup>160</sup>

### *B. Application of Foster Care Laws Has Disparate Effect*

Part of the reason for the problem of racial disproportionality and disparity that is manifested in foster care is the overarching legal standard, the "best interests of the child," which is at best vague.<sup>161</sup> Indeed, the best interests of the child legal standard in foster care is so indeterminate as to render it unhelpful.<sup>162</sup> Its indeterminacy "allows foster care professionals and even judges to substitute their own judgment about what is in a child's best interest and allows unintended biases to permeate decision-making."<sup>163</sup>

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158. *ICWA Still Under Siege*, *supra* note 157 (noting particularly skewed ratios of Native American children in foster care in Montana, Nebraska, Oregon, Utah, North Dakota and Washington). "In this second decade of the 21st century, American Indian children in states across the country are still taken from their families and placed in foster care or adoptive homes at a much higher rate than those for other kids—just as they were before the passage of the [ICWA]." *Id.*

159. *See id.*; *Incentives and Cultural Bias Fuel Foster Care System*, *supra* note 14; *see also supra* notes 32–33 and accompanying text.

160. H.R. REP. NO. 95-1386, at 10–11 (noting ignorance of cultural differences and social norms contributes to abusive agency practices that go unchecked by judges who themselves are not knowledgeable about Indian life). "The Indian child welfare crisis will continue until the standards for defining mistreatment are revised. . . . [This] require[s] a sharper definition of the standards of child abuse and neglect." *Id.*

161. *See Smith v. Org. of Foster Families*, 431 U.S. 816, 834 (1977) (noting within the legal standard the unconscious bias against parents' poverty and lifestyle); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 45 & n.13 (1981) (Blackmun, J., dissenting) (noting that several courts have invalidated termination of parental rights statutes based on this vague standard).

162. *See Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975); Mnookin, *supra* note 2, at 602.

163. Cooper, *supra* note 18; *accord Smith*, 431 U.S. at 835 n.36 ("[J]udges too may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values."); Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18. S. CAL. INTERDISC. L.J. 259, 284 (2009) ("Like the rest of us, judges draw on embedded knowledge structures, and they tend to turn first to whatever 'commonsense background theory [is] prevalent in the legal culture of their era.'" (alteration in original) (quoting Phoebe C. Ellsworth, *Legal Reasoning*, in THE CAMBRIDGE



Even the Supreme Court has questioned this standard, and indeed warned that “[t]he [best interest] standard is imprecise and open to the subjective values of the judge.”<sup>164</sup> The Supreme Court “more than once has adverted to the fact that the ‘best interests of the child’ standard offers little guidance to judges and may effectively encourage them to rely on their own personal values.”<sup>165</sup>

Regarding this loose standard, other scholars of the foster care system have also voiced their concern. Professor Linda Berger, for example, found that “[t]he best interests of the child standard has been criticized almost since adoption because its indeterminacy invites the use of cognitive shortcuts; these shortcuts include stereotypes and biases as well as the scripts and models left behind by metaphors and stories.”<sup>166</sup> Professors Annette Appell and Bruce Boyer have similarly noted the inherent harm in this malleable standard:

As a vehicle for judging when state intervention is appropriate, a “best interest” standard offers little guidance in determining which families and children should be subject to judicial scrutiny. Although it is important for courts to consider children’s interests, this standard is exceptionally vulnerable to arbitrary decisionmaking. The lack of a uniform understanding of the term “best interests,” coupled with the uncertainty inherent in its use, raises significant concerns about “social engineering.” Furthermore, such ambiguity will have the greatest impact on the least visible and respected population of families whose racial and economic status already place them at great risk of destructive state intervention.<sup>167</sup>

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HANDBOOK OF THINKING AND REASONING 685, 686 (Keith J. Holyoak & Robert G. Morrison eds., 2005)).

164. *Lassiter*, 452 U.S. at 45 (Blackmun, J., dissenting).

165. *Id.* at 45 n.13; accord *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” (quoting *Smith*, 431 U.S. at 862–63 (Stewart, J. concurring))).

166. Berger, *supra* note 163, at 298.

167. Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL’Y 63, 66 (1995) (footnote omitted). In their article, Professors Appell and Boyer also note that routine application of this amorphous legal standard has been twisted to pit the child in the system against her parent. “In fact, the mistaken belief that children’s interests are not served by such protections significantly contributes to the false dichotomy erected between ‘parental rights’ and the ‘best interests of the child.’” *Id.* at 73–74; see also Cooper, *supra* note 18

Likewise, race critics of the amorphous legal standard generally argue that it “disparately impact[s] minority groups, even when it is intended to benefit such groups.”<sup>168</sup> Amorphous standards “obscure[] pretextual racism (racism that does not appear as such on its face), and allow[] it to go unchecked.”<sup>169</sup>

This amorphous and indeterminate standard moreover fails to account for the fact that “[c]hildren grow up in a wide variety of different physical, social and cultural circumstances.”<sup>170</sup> With support from UNICEF, researchers Evans and Myers from the Consultive Group on Early Childhood Care and Development conducted workshops examining childrearing practices in Latin America and Sub-Saharan African. They found that there is diversity between different cultures and “no ‘right way’ to bring up children.”<sup>171</sup> They add that “many programs intended to help young children are conceived of as if all children and circumstances are the same.”<sup>172</sup> Most societies still assign the nuclear family with responsibility for raising its children.<sup>173</sup> To

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(noting how colorblind laws in the child welfare system foster institutional discrimination against families of color).

168. Brooks, *supra* note 89, at 90 (footnote omitted) (arguing that “facially neutral laws can and oftentimes do” have disparate effects on minorities); *see also* Ards et al., *supra* note 66, at 1484 (“It is likely that racialized beliefs manifest themselves when there is great discretion on the part of the decision maker but not when the law makes explicit that there are no exceptions.”).

169. Brooks, *supra* note 89 at 94, 96 (“This, indeed, is one of the most persistently argued themes in CRT, that the law legitimizes the ‘perpetrator’s’ or ‘insider’s’ perspective and is constructed by the dominant group to serve its own purpose.” (footnote omitted)); *accord* Richard Delgado & Jean Stefancic, *Introduction*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d. ed. 2000), at x, xvi (noting how racism has become “normal, not aberrant, in American society. Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture.”).

170. Judith L. Evans & Robert G. Myers, *Childrearing Practices: Creating Programs Where Traditions and Modern Practices Meet*, COORDINATOR’S NOTEBOOK, no. 15, 1994, at 3, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.193.6829&rep=rep1&type=pdf>.

171. *Id.*

172. *Id.* (cautioning that policies and program that disregard different forms of childrearing may be misguided).

173. *Id.* at 5. As derived from and influenced by Biblical and Christian traditions, the dominant image is still the marital family as the “natural and preferred family unit, even as the number of such families diminishes.” Berger, *supra* note 163, at 270–71 (footnote omitted); *see also* Michael H. v. Gerald D., 491 U.S. 110, 123 n.3 (1989) (“The family unit accorded traditional respect in our society, which we have referred to as the ‘unitary family,’ is typified, of course, by the marital family . . . .”); *cf.* Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 605–13 (citing the work of Professor Bartholet

truly understand and appreciate different childrearing practices, they must be examined in a larger context, as Evan and Myers list:

[T]he physical environment—the climate/geography of the area that determines the need for shelter from the heat or cold, and the relative ease of raising food crops to sustain the family;

the socio-political climate that determines whether families have security or a life dominated by fear;

the economic climate that determines a family's ability to survive and thrive;

the philosophical and religious systems that provide a base for the values and beliefs of the society and a cultural identity for the family;

the past, which is presented to the child through legends, myths, proverbs, riddles and songs that justify the existing social order and reinforce customs;

the family and community who act as models of expected behavior; [and]

the village, which presents a variety of situations calling for prescribed behavior.<sup>174</sup>

To be sure, the law does not contemplate this larger context when judging parenting in foster care systems and deciding whether and when to remove children from their families, especially poor children of color.<sup>175</sup> Because of the long tradition of strong and extended family structures in Native American and African American families, these families do not often fit the nuclear family norm.<sup>176</sup> Foster care

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on the stigma and bias adoptive parents face to fit within the nuclear family ideal).

174. Evans & Myers, *supra* note 170, at 9.

175. See Berger, *supra* note 163, at 259 (“[F]amily law remains tethered to culturally embedded stories and symbols. While so bound, family law will fail to serve individual families and a society whose family structures diverge sharply by education, race, class, and income.”). “Lawyers and judges argue and decide within a context that is limited, but also illuminated, by experiences and preconceptions derived from the culture’s models and myths.” *Id.* at 269; see also Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567, 568 (2007) (reporting the decline in recent decades of the “traditional nuclear family” in America, especially for disadvantaged minorities).

176. One District of Columbia court acknowledged and emphasized the importance of different family structures in the African American communities:

African-American families have a long standing tradition of having extended kin who may not be biologically related, but are related in terms of the relationship of

professionals and judges instead conflate the absence of a typical nuclear family with neglect.<sup>177</sup> Without understanding the cultural mores of a family's tribe or community, agencies, lawyers, and judges make unfair generalities about Native American and African American families.<sup>178</sup> According to Professor Berger, "the best interests of the child standard fails to explain child custody outcomes" that become "cluttered with outmoded metaphors, simplistic images, and unexamined narratives" and interferes with agency and judicial decision-making, subjecting the standard to unintended bias.<sup>179</sup>

#### IV. USING SYSTEMS CHANGE THEORY TO EXPOSE FOSTER CARE BIAS

Systems thinking is one useful framework for exposing the unintended bias in the system that in part causes the disproportionality and disparity affecting Native American and African American families. By visualizing the system, one can more easily see those critical junctures or points of leverage where change is most effective.

##### A. What Is Systems Change?

Thinking in systems is simply a different way of looking at the world.<sup>180</sup> Systems theory provides a framework for understanding

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that family. And that is exceedingly important in our definition of self and has been one of the hallmarks that I think have been important in terms of our own survival as a people.

*In re* T.J., 666 A.2d 1, 8 (D.C. 1995) (quoting expert witness and foster care professional in the case); see also ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 15 (noting how it is customary for extended Native American families to live together in one home).

177. See Roberts, *supra* note 16, at 1619 ("The nuclear family norm gives [African American] women the responsibility of caregiving while denying them adequate government support and vilifying those who do not depend on husbands.").

178. See H.R. REP. NO. 95-1386, at 10-11. See generally NRC WEBINAR, *supra* note 101.

179. Berger, *supra* note 163, at 260, 268 ("Like automatically acquired metaphors, myths affect our thinking without our noticing the effect . . ."); see also Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 2-3 (1987) (arguing no rational basis exists for child custody decisions under this far from clear-cut legal standard); Fraidin, *supra* note 21, at 13 (arguing that "so powerful is the master narrative of child welfare" that "the natural protective response" is removing children from their homes).

180. DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER 6 (Diana Wright, ed., 2008); see also MARSHALL GANZ, *Leading Change: Leadership, Organization, and Social Movements*, in HANDBOOK OF LEADERSHIP THEORY AND PRACTICE: AN HBS CENTENNIAL COLLOQUIUM ON ADVANCING LEADERSHIP 527, 535 (Nitin Nohria & Rakesh Khurana eds., 2010), available at <http://leadingchangenetwork.com/files/2012/05/Chapter-19-Leading-Change-Leadership-Organization-and-Social-Movements.pdf>.

complex systems: environmental, economic, social, and legal.<sup>181</sup> Considered a discipline, systems thinking is derived from science and social science with roots in history, psychology, and organizational behavior.<sup>182</sup>

The systems-thinking lens allows us to reclaim our intuition about whole systems and hone our abilities to understand parts, see interconnections, ask “what-if” questions about possible future behaviors, and be creative and courageous about system redesign. Then we can use our insights to make a difference in ourselves and our world.<sup>183</sup>

“A system is an interconnected set of elements that is coherently organized in a way that achieves something.”<sup>184</sup> Systems are comprised of three components: the elements or players in the system; the interconnections between those components or players; and the true purpose of the system.<sup>185</sup> Under this framework, true purpose is not the system’s own rhetoric about its purpose or mission but rather how it behaves over time.<sup>186</sup> If there is a consistent behavior over time, quite

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181. MEADOWS, *supra* note 180, at XI; Thomas J. Bernard et al., *General Systems Theory and Criminal Justice*, 33 J. OF CRIM. JUST. 203, 203 (2005), available at <http://www2.cohpa.ucf.edu/crim.jus/documents/Paolinegeneralsystemstheoryandcriminaljustice.pdf> (“General systems theory (GST) had a long tradition in the natural, behavior, and social science . . . where it added substantial insights to the understanding of a wide variety of complex phenomena.”(internal citations omitted) (citing studies by Ludwig von Bertalanffy and T. Downing Bowler)).

182. MEADOWS, *supra* note 180, at IX (“[S]ystems thinking transcends disciplines and cultures, and when it is done right, it overarches history as well.”); see also JAKE CHAPMAN, SYSTEM FAILURE: WHY GOVERNMENTS MUST LEARN TO THINK DIFFERENTLY 35 (Demos 2d ed. 2004), available at <http://www.demos.co.uk/publications/systemfailure2> (“Systems thinking is more like history or philosophy: it is an intellectual approach to issues that can apply to a wide range of human experience.”); GANZ, *supra* note 180, at 529 (noting roots in sociology).

183. MEADOWS, *supra* note 180, at 6–7.

184. *Id.* at 11.

185. *Id.* (offering examples of such systems as a football team with its players, field, and ball; the *interconnections* of the rules of the game, communications between players, “and the laws of physics that govern the motions of the ball and players”; and the purpose of the team to win, have fun, get exercise, etc.). In her book, Donella Meadows asks whether you can identify the parts of a system, whether they affect each other, and together do the parts produce an effect different from the effect of each part on its own? *Id.* at 13. Finally, “Does the effect, the behavior over time, persist in a variety of circumstances?” *Id.*

186. *Id.* at 14 (“If a government proclaims its interest in protecting the environment but allocates little money or effort toward that goal, environmental protection is not, in fact, the government’s purpose.”).

likely some feedback loop exists or some mechanism is creating that consistent behavior.<sup>187</sup>

Systems analysts universally recommend maps, models, or “rich pictures” of the system to describe it and more effectively understand it.<sup>188</sup> Maps offer panoptic views of systems, which help to highlight the three components of the system (players, interconnections, and purpose); critical junctures where incentives reinforce interconnections or dynamics between players; and, finally, where points of leverage in systems can yield change, to rebuild systems.<sup>189</sup>

Changing a system under this theory depends on the degree to which the components are affected: changing the players or elements has the least effect on the system, but changing dynamics between elements and especially the ultimate purpose of the system has the greatest effect.<sup>190</sup> It

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187. *Id.* at 25. There are essentially two types of feedback loops: balancing or negative feedback loops that tend to stabilize a system, and reinforcing or positive feedback loops. *See id.* at 28, 30–31; *see also* Donalla H. Meadows, *Places to Intervene in a System*, *WHOLE EARTH*, Winter 1997, at 80–81 [hereinafter *Places to Intervene in a System*] (distinguishing between negative feedback loops that regulate with positive ones that “drive growth, explosion, erosion, and collapse in systems”). Intervention is necessary to reduce a positive feedback loop’s power. *Id.* at 81. “Since a core systems idea is feedback, both positive (or self-reinforcing) and negative (or self-correcting), complexity can often appear mysterious because of a rich set of feedback loops between the components.” CHAPMAN, *supra* note 182, at 35.

188. CHAPMAN, *supra* note 182, at 46 (defining rich picture as a “freehand representation of whatever the individual regards as the most salient features of the mess” or complicated system with competing but equally valid perspectives on the problems within it); *Places to Intervene in a System*, *supra* note 186, at 78 (modeling systems). *See generally* MEADOWS, *supra* note 180 (using many different modeling systems within the book).

189. *See* CHAPMAN, *supra* note 182, at 14 (“The core aspects of systems thinking are gaining a bigger picture (going up a level of abstraction) and appreciating other people’s perspectives on an issue or situation.”); *Places to Intervene in a System*, *supra* note 187, at 78 (defining “leverage points” as “places within a complex system (a corporation, an economy, a living body, a city, an ecosystem) where a small shift in one thing can produce big changes in everything”). Meadows suggests looking for leverage points around rates of growth: “[T]he more you have of something, the more you have the possibility of having more.” *Id.* at 82; *see also* *U.S. Natural Gas Export Stir Debate*, *NAT’L PUB. RADIO* (Feb. 11, 2013), <http://www.npr.org/2013/02/11/171672406/u-s-natural-gas-exports-stirs-debate?sc=emaf> (discussing how energy policy issues like the Keystone pipeline or energy exports represent pressure points where key decisions are made and points “where people can put pressure on the administration to signal what they believe”). *See generally* Susan Sturm, *Activating Systemic Change Toward Full Participation: The Pivotal Role of Boundary Spanning Institutional Intermediaries*, 54 *ST. LOUIS U. L.J.* 1117 (2010).

190. MEADOWS, *supra* note 180, at 17 (“[T]he least obvious part of the system, its function or purpose, is often the most crucial determinant of the system’s behavior. . . . Changing relationships usually changes system behavior.”). *But see* *Places to Intervene in a System*, *supra* note 187, at 83 (noting the exception when changing a single

is important to note, however, that systems will react and resist change in order to perpetuate themselves.<sup>191</sup> Social movements that are successful focus on redefining systems, and also changing their rules.<sup>192</sup>

*B. Mapping the Foster Care System: Its Players, Dynamics, and True Purpose*

Well documented in foster care, unintentional bias affects all of the system's players.<sup>193</sup> Different standards for parenting, education, lifestyles, and homemaking, to name a few, widen the gap between the privileged and the poor. Determining when children are truly at risk of serious harm and exactly what will abate it are subjective decisions, subject to unwitting bias. Stereotyping, cultural ignorance, and cultural dominance often underlie decisions to sever families, especially Native American and African American ones.<sup>194</sup> Applying a systems framework to foster care means highlighting power structures that have a disparate minority impact and exposing unintended bias in the system, and examining the players themselves helps explain why.<sup>195</sup>

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player at the top of the system can change the system's goal).

191. MEADOWS, *supra* note 180, at 15 (“An important function of almost every system is to ensure its own perpetuation.”); *see also* CHAPMAN, *supra* note 182, at 22 (“Systems thinking predicts that individuals will not change their mode of thinking or operating within the world until their existing modes are proved beyond doubt, through direct experience, to be failing.”).

192. GANZ, *supra* note 180, at 527.

193. *See Protecting Children or Punishing Mothers*, *supra* note 40, at 578 n.3 (“Bias in child protection proceedings is deep, complicated, and obscure. Without doubt, the bias faced by women in these proceedings is directly and inextricably related to larger social policies which harm women . . .”); Azar & Goff, *supra* note 27, at 534 (surveying the social science and empirical research that shows unequal treatment of racial and ethnic minorities in foster care); *see also supra* note 17 (noting the many conferences, some annual, which address this issue).

194. *See supra* Parts II.B, II.C.2; *see also* NRC WEBINAR, *supra* note 101 (explaining how bias is tied into the best interests of a Native American child when cultural connections are disregarded and no one appreciates the value of language, dances, gatherings the Native American child will lose if severed from her family and tribal connections).

195. *See Places to Intervene in a System*, *supra* note 187, at 82 (“If you want to understand the deepest malfunctions of systems, pay attention to the rules, and to who has power over them.”). Meadows cautions to beware of closed systems that within “[i]ts rules exclude almost any feedback from other sectors of society” which is precisely what the closed and confidential foster care system does: seals its own practices from the public. *Id.* at 82; *see also* CHAPMAN, *supra* note 182, at 21 (noting another system failure is “a tradition of secrecy used to stifle feedback and learning”); Fraidin, *supra* note 21, at 3 (showing how confidentiality laws mask abuses within the foster care system itself).

### 1. Foster Care's Players and Their Interconnectedness

In this system, foster care agencies, lawyers, judges, and impoverished families comprise the key players in the system. Decision-making power shifts between the professionals in the system and “moment-by-moment appraisals [of indigent families of color] may be infused with biases, differing values, and stereotypical views, which can then alter child welfare and legal professionals’ interactions with families, and ultimately culminate in faulty decision making.”<sup>196</sup>

As one such professional player, foster care agencies have power and tend to prefer foster care over helping at-risk children in their own homes, which is also known as family preservation.<sup>197</sup>

Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child.<sup>198</sup>

Factors that contribute to these unintended biases include: lack of sufficient social work staff; limited resources and services available to natural and foster families; heavy caseloads of agency workers; and high turnover rates.<sup>199</sup> This power of the foster care agency that favors foster care is indeed reflected in the latest data: of all of the potential placement options for children, non-kin foster care is still the largest.<sup>200</sup>

Lawyers in the foster care system share power in decision-making, but many of those appointed for indigent parents are “likely to have few resources, little training, and high caseloads.”<sup>201</sup> “It is typical for parent defenders to carry caseloads of 500 in urban jurisdictions.”<sup>202</sup> Carrying such high caseloads often leads to ineffective lawyering, which compounds the disenfranchisement of African American and Native American parents in those decisions regarding their own children.<sup>203</sup>

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196. Azar & Goff, *supra* note 27, at 534. “Emphasis has not been placed on the implicit processes that can affect professionals in [the child welfare system].” *Id.* (emphasis omitted).

197. *See* Smith v. Org. of Foster Families, 431 U.S. 816, 834 n.35 (1977).

198. *Id.* at 834.

199. *Id.* at 834 n.35.

200. AFCARS REPORT, *supra* note 29, at 4.

201. *Protecting Children or Punishing Mothers*, *supra* note 40, at 582.

202. *Id.* at 582 n.26.

203. Some jurisdictions have recognized parents’ statutory right to effective assistance of counsel in child abuse and neglect cases, and especially those proceedings in which parental



Overburdened and thus ineffective lawyers are less likely to pursue compliance with the law on behalf of minority parents, thus depriving them of due process of law.<sup>204</sup> Like agencies, lawyers are not immune from implicit bias against families and especially parents in the system, nor are judges.<sup>205</sup>

Burdened with heavy dockets, judges sometimes discourage and even threaten zealous parent advocates because their conduct upsets the status quo and is time-consuming.<sup>206</sup> Due process is less defined by law and more by “how we do things here.”<sup>207</sup> But the business of judging foster care is time-consuming, as Professors Annette Appell and Bruce Boyer explain, “Judges must be careful to distinguish cultural or value-based differences in child-rearing practices from parental conduct that falls beneath minimally acceptable parenting standards and raises a legitimate concern about the health, safety, or welfare of the child.”<sup>208</sup> But coupled with the loose legal standards that govern foster care and invite subjective decision-making, judges are often left to their own devices.<sup>209</sup>

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rights are terminated. *See, e.g., In re R.E.S.*, 978 A.2d 182, 189 (D.C. 2009) (noting in an adoption and termination of parental rights context for the first time in the District of Columbia a parent’s statutory right to effective assistance of counsel and discussing trends in other jurisdictions to recognize that right).

204. *See id.*; NRC WEBINAR, *supra* note 101.

205. *See* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 22 (2011) (noting that while judges are sometimes presumed to be immune from human foibles, they are people too and “driven by the same combination of incentives, experiences, and cognitive biases as the rest of us”); NRC WEBINAR, *supra* note 101 (commenting on how frequently Native American parents distrust their own attorneys and what counsel can do to recognize and highlight what unique experiences a Native American child will have with his or her own tribe and family).

206. *See* BARTON, *supra* note 205, at 22–26 (“Richard Posner and other scholars of economics and the law have argued that common law judicial decision makers are more likely than legislatures to create efficiency-maximizing rules of law”; “[r]ational, self-interested bureaucrats will naturally seek to increase their influence and make their jobs easier.”); CHAPMAN, *supra* note 182, at 20 (noting one system failure is “lack of time to do anything other than cope with events”); M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 378–79 (2012) (describing judges’ displeasure when advocacy “threatens courthouse norms”).

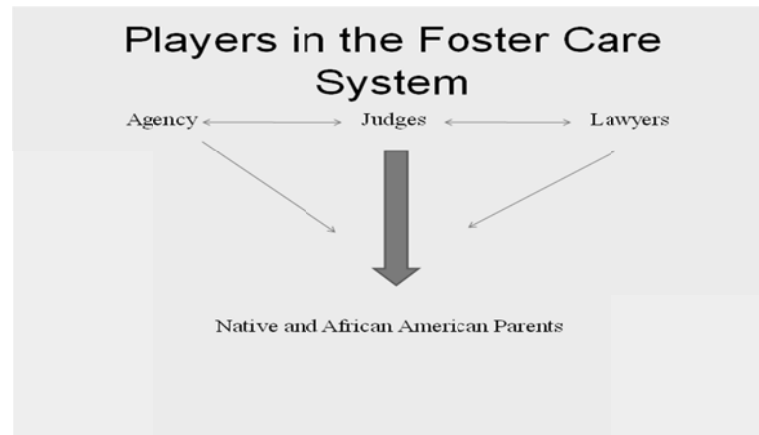
207. Fabricant, *supra* note 206, at 378.

208. Appell & Boyer, *supra* note 167, at 64–65.

209. *See supra* note 164 and accompanying text (noting in part Justice Blackmun’s warning to judges that “the best interests of the child standard” offers little guidance and encourages them to rely on their own personal values).

By contrast, families of color who are haled into the foster care system all too often lack power and resources.<sup>210</sup> These families become “passive, voiceless subjects of the [system’s] paternalistic directives, [not] active participants in the determination of their own destinies.”<sup>211</sup> According to Professor Appell, these overwhelmingly indigent families often receive public assistance,<sup>212</sup> which brings them under greater scrutiny.<sup>213</sup>

In foster care, a model of this agency-judge-lawyer triumvirate that holds the power to make decisions and the indigent families of color and their attendant lack of power might look like this:



In this diagram, the two-way arrows between the professionals denote their shared decision-making power.<sup>214</sup> Judges in child welfare routinely delegate their discretion to agencies and lawyers on issues of removal, placement, and services.<sup>215</sup> Judges often adopt agencies’ and

210. See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 43 n.10 (Blackmun, J., dissenting) (“[T]he State and indigent parent are adversaries, and the inequality of power and resources is starkly evident.”); Cooper, *supra* note 18; *supra* Parts II.B, II.C.2.

211. Cooper, *supra* note 18.

212. See *supra* Part II.B (showing high correlation between neglect and poverty in foster care).

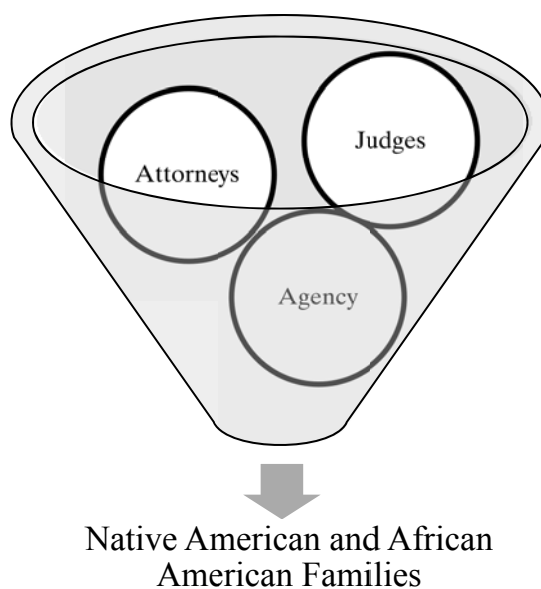
213. *Protecting Children or Punishing Mothers*, *supra* note 40, at 584.

214. See CHAPMAN, *supra* note 182, at 20 (noting one system failure, namely “shared assumptions between civil servants and ministers that command and control is the correct way to exercise power”).

215. See Azar & Goff, *supra* note 27, at 535 (highlighting the “three core domains” where disparities manifest).

lawyers' recommendations about when to remove children from their homes and when and whether they are safe to ever return.<sup>216</sup> The one-way arrows from the professionals to parents also reflect each professional player's power over parents, who are too often presumed unfit to parent by virtue of their race or poverty.<sup>217</sup> Note here only one-way arrows from professionals to the parents to reflect the lack of power these players have in the system.

Another rich picture of the significance of the professional players shared power to decide the fate of Native American and African American families in foster care might look like this:



In this model, judges, attorneys, and foster care agencies share a position at the top and their decisions are funneled down and imposed

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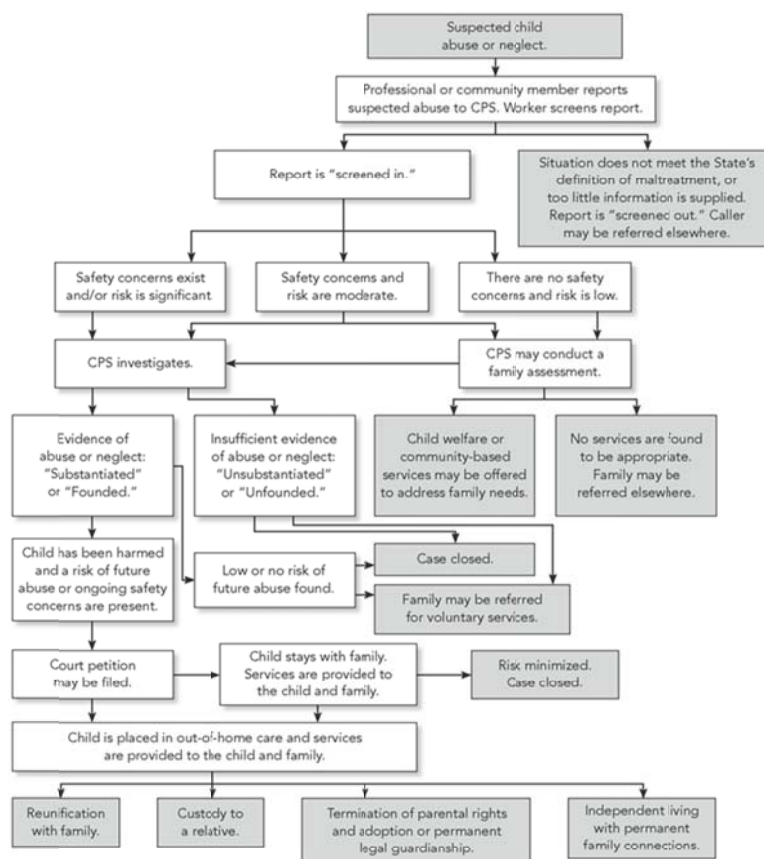
216. *See id.* at 562; *see also* Fraidin, *supra* note 21, at 38 (“Judges were reluctant to rule against agency requests for removal, or to return a child without approval from the agency. . . . Judges often ‘rubber stamp’ agency recommendations because they lack confidence in their ability to assess the decision-making process.” (citing Therese Lund & Jennifer Renne, *Child Safety: A Guide for Judges and Attorneys* 11 (2009), [http://www.nrc cps.org/documents/2009/pdf/The\\_Guide.pdf](http://www.nrc cps.org/documents/2009/pdf/The_Guide.pdf))).

217. *See* ROBERTS, *supra* note 20, at vi, 34; *supra* Parts II.B, II.C.2.

onto the Native American and African American families who often have no input in the outcome.

## 2. Foster Care's Critical Junctures

Besides examining the players, systems thinking also examines critical junctures or points of leverage where incentives reinforce interconnections or dynamics between players.<sup>218</sup> According to the U.S. Department of Health and Human Services's Children's Bureau, a flowchart of the child welfare system looks like this<sup>219</sup>:



218. MEADOWS, *supra* note 180, at 145.

219. CHILD WELFARE INFO. GATEWAY, *supra* note 2, at app.

As this map reveals, the system is defined by many critical junctures. Each rung represents one more stage in the life cycle of a family's case in foster care, and each box represents one more decision that professionals make in the lives of families in foster care, and each decision is subject to vague standards and implicit bias.

Studies repeatedly show that “children of color are overrepresented at all decision points of the child welfare system: reporting, investigation, substantiation, placement, and exit from [foster] care.”<sup>220</sup> If all of the critical junctures in this map were shaded, every single box would represent a decision-making opportunity potentially subject to racial bias. At the very least, the research points to those core domains in foster care—removal, placement, and services—are where bias is most manifest.<sup>221</sup> A simplified flowchart of those critical junctures might look like this:



220. ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, POLICY ACTIONS TO REDUCE RACIAL DISPROPORTIONALITY AND DISPARITIES IN CHILD WELFARE: A SCAN OF ELEVEN STATES 2 (2009), available at <http://www.antiracistalliance.com/PolicyActionstoReduceRacialDisproportionalityandDisparitiesinChildWelfare.pdf>.

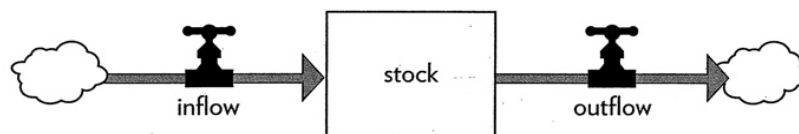
221. Azar & Goff, *supra* note 27, at 535 (reviewing empirical evidence of differential treatment of racial and ethnic minorities is most pronounced in “three core domains: (1) entry level into the system (e.g., reporting and substantiation rates); (2) foster care placement (e.g., rates, types made, and their lengths); and (3) level of service provision”); see also NRC WEBINAR, *supra* note 101 (placement is where unintended bias is obvious in ICWA). In the flowchart above, those core domains are mostly represented through the existing boxes.

Each core domain of critical decision-making is interconnected in foster care, and racial bias early on can affect later decisions or present itself anew at subsequent junctures. Each core domain or critical juncture point also represents a leverage point where to target efforts to change and improve the system, but change here depends on the underlying purpose of the system changing too.<sup>222</sup>

### C. Foster Care's True Purpose Is Perpetuating Itself

#### 1. The Stocks and Flows in Foster Care

One way that system theorists map a system's true purpose is to diagram the "stock" of a system, where stock is the foundation of any systems that can be manipulated.<sup>223</sup> "Flows" are actions to increase or decrease the stocks in a system.<sup>224</sup> In her book, systems analyst Donella Meadows likens the stock and the leverage points that affect the inflow and outflow to faucets; if you turn the faucets on or off at particular places, the stock is affected.<sup>225</sup> A model of the stocks of a system and the inflows and outflows that affect it are depicted here by Professor Meadows<sup>226</sup>:



**Figure 1.** How to read stock-and-flow diagrams. In this book, stocks are shown as boxes, and flows as arrow-headed "pipes" leading into or out of the stocks. The small T on each flow signifies a "faucet;" it can be turned higher or lower, on or off. The "clouds" stand for wherever the flows come from and go to—the sources and sinks that are being ignored for the purposes of the present discussion.

In foster care, the stock of the system is the population of children in foster care, particularly the number of African American and Native American children in foster care, a quantifiable and verifiable element.

222. See *supra* note 185 and accompanying text.

223. MEADOWS, *supra* note 180, at 17 ("Stocks are the elements of the system that you can see, feel, count, or measure at any given time.").

224. See *id.* at 18. "A stock can be increased by decreasing its outflow rate as well as by increasing its inflow rate." *Id.* at 22.

225. *Id.* at 18.

226. *Id.*

Based on the data and national debate, the stock of the system (these minority children in foster care) has been disproportionately higher either because the system is racially biased against them or because they are at greater risk of maltreatment.<sup>227</sup>

Generally, those in the Racial Disproportionality Movement believe that disproportionality and disparities exist precisely because the stock of the foster care system is balanced unfairly in favor of foster care over family preservation.<sup>228</sup> As its name suggests, the family preservation paradigm regards the family unit as paramount.<sup>229</sup> Parents-in-need-of-help is a universal concept,<sup>230</sup> and services are designed to meet parents in their homes and empower families.<sup>231</sup> Family preservation strategies are what often increase chances of success for families truly at risk, and many jurisdictions focus their efforts in child welfare here.<sup>232</sup> But according to the Child Welfare Information Gateway, “The level of available prevention services, however, is often inadequate. Jurisdictions struggling with funding are sometimes reluctant to direct money toward prevention efforts when programs for children already in the system, such as foster care, have many funding needs.”<sup>233</sup> Interestingly, the family preservation strategies are generally considered cheaper than traditional foster care because the services are provided to families at-risk without the additional costs of foster care—which can be up to seven-hundred dollars per month per child of taxpayer dollars.<sup>234</sup>

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227. See *supra* Part II.C.

228. E.g., Wexler, *supra* note 60, at 436, 447; see also Roberts, *supra* note 16, at 1626; *supra* note 16 and accompanying text.

229. Appell & Boyer, *supra* note 167, at 64 (“On the one hand, limiting the state’s freedom to intervene coercively in family relations reflects a societal value placed on family autonomy and preservation of family relations. . . . Deference to the family is based on an acknowledgment of the complexity and variety of human relationships.”).

230. See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., PREVENTING CHILD MALTREATMENT AND PROMOTING WELL-BEING: A NETWORK FOR ACTION 9–16 (2013).

231. See, e.g., *id.* at 13.

232. See, e.g., Edgar S. Cahn et al., “Public Notice Forums”: *Choosing Among Alternatives to Confront the Intent Requirement*, CLEARINGHOUSE REV. J. OF POVERTY L. & POL’Y, 165, 170 (2010) (“Michigan, Wisconsin, and New York have reduced both the number of children in placement and cost to the system by relying instead on community-based family support programs.”); see also *infra* Part V.

233. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 5 (internal citation omitted).

234. See Roberts, *supra* note 16, at 1626–27; *Native Foster Care*, *supra* note 18; WINOKUR ET AL., *supra* note 7, at 13 (“In the US, it may be more cost-effective to place children with relatives in light of the comparable outcomes and lower payments and fewer services provided to kin caregivers.”).

But it is the foster care or child protection paradigm that prevails today from which the Racial Justification Movement hails.<sup>235</sup> The underlying assumption in this paradigm is “[i]f you remove a child from the home, the child will be safe. If you leave a child at home the child is at risk.”<sup>236</sup> In his now-famous quote that captures the sentiment of foster care, then-Mayor Rudy Giuliani said,

Any ambiguity regarding the safety of the child will be resolved in favor of removing the child. . . . Only when families demonstrate to the satisfaction of [New York’s foster care agency] that their homes are safe and secure, will the children be permitted to remain or be returned to the home.<sup>237</sup>

From a systems thinking perspective, the two movements appear to disagree on how to address the disproportionate stock of African American and Native American children in foster care.<sup>238</sup> Not surprisingly, this disagreement arises from the competing paradigms and their priorities in the system itself: foster care versus family preservation.<sup>239</sup> According to the Pew Charitable Trust, the history of these movements and the ideological debates they muster explain their current positions:

The expansion of the federal government’s influence in shaping national child welfare policy has been punctuated by two key ideological debates. The first is a debate about the rights of state and local governments, versus the responsibility of the federal government to ensure adequate protection for all children. The second debate centers around the rights of parents versus the rights and needs of the child. For example, when the pendulum

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235. See *supra* Part II.C.1.

236. NAT’L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING (Jan. 3, 2013) [hereinafter FOSTER CARE VS. FAMILY PRESERVATION], available at <http://www.nccpr.org/reports/01SAFETY.pdf>.

237. RUDOLPH W. GIULIANI, PROTECTING THE CHILDREN OF NEW YORK: A PLAN OF ACTION FOR THE ADMINISTRATION FOR CHILDREN’S SERVICES 6 (1996), available at [http://www.nyc.gov/html/acs/downloads/pdf/pub\\_reform\\_plan\\_1996.pdf](http://www.nyc.gov/html/acs/downloads/pdf/pub_reform_plan_1996.pdf).

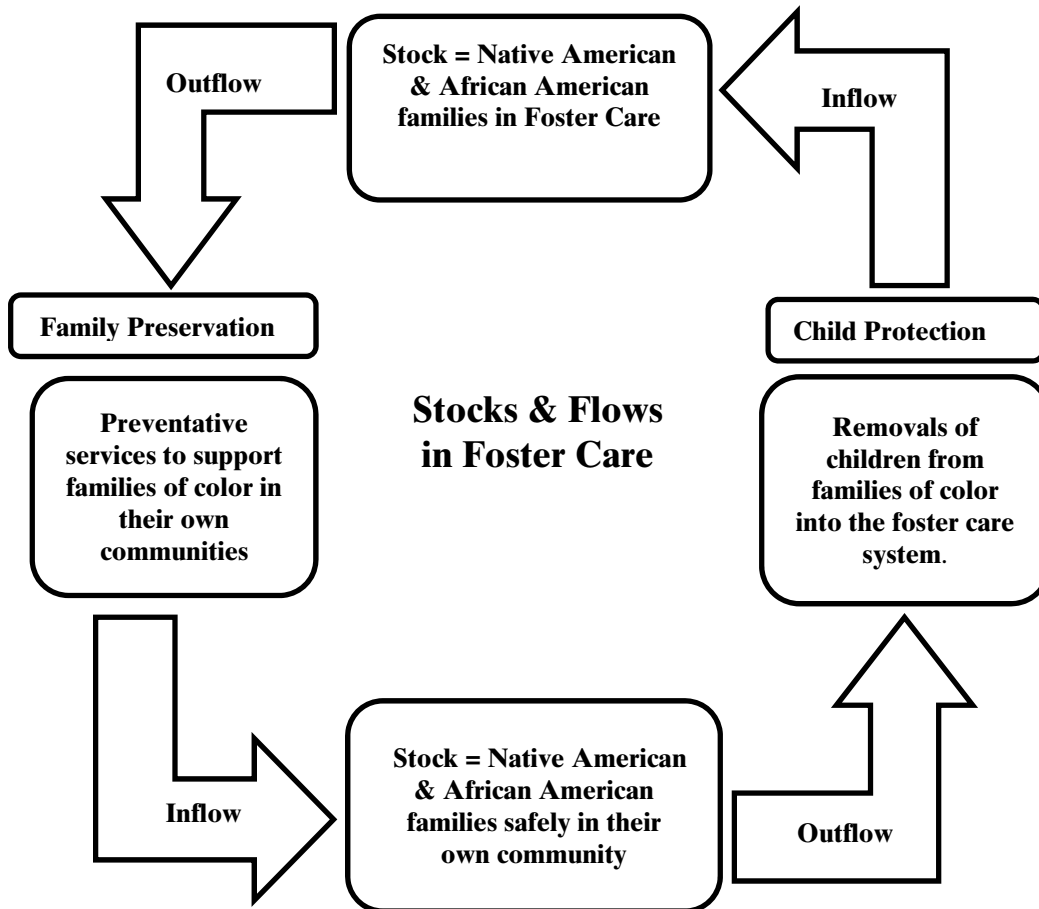
238. See Nat’l Coal. for Child Prot. Reform, *ISSUE PAPERS on Family Preservation, Foster Care and Reasonable Efforts*, NCCPR, <http://nccpr.info/issue-papers/> (last visited Nov. 11, 2013) (posting fifteen issue papers on the debate between the two paradigms and information on both: data, costs and benefits, disparities, explanations, stories, etc.).

239. Appell & Boyer, *supra* note 167, at 64 (“The court’s function has traditionally involved the balancing of sometimes competing purposes: the protection of family integrity and the protection of children.”); FOSTER CARE VS. FAMILY PRESERVATION, *supra* note 236.



of public opinion swings toward parental rights, the goal of family preservation is viewed as paramount. Conversely, swings toward the rights of the child result in greater emphasis on ensuring child safety and well-being above all else.<sup>240</sup>

The foster care versus family preservation stock model might look like this:



240. KASIA O'NEILL MURRAY & SARAH GESIRIECH, PEW COMM'N ON CHILDREN IN FOSTER CARE, A BRIEF LEGISLATIVE HISTORY OF THE CHILD WELFARE SYSTEM 1 (2004), available at [http://www.pewtrusts.org/our\\_work\\_report\\_detail.aspx?id=48994](http://www.pewtrusts.org/our_work_report_detail.aspx?id=48994); see also Appell & Boyer, *supra* note 167, at 66 (noting how the pendulum has swung from favoring family preservation to favoring foster care, which federal laws have prioritized in turn). "In our view, the replacement of traditional parent-focused standards for court intervention by a purportedly child-focused standard would represent a disturbing erosion of critical due process protections that serve the interests of both parents and children." *Id.*

In this diagram, family preservation efforts are depicted on the left side to increase the inflow of safe African American and Native American families in the community or decrease those in foster care through community-based preventive services to help support poor minority families. The child protection efforts, conversely, are represented on the right side of the diagram to increase the inflow of at-risk children into foster care or decrease the number of children at risk in their homes and communities through removals for their own safety.

Family preservation and child protection represent the faucets or larger leverage points of the foster care system that can affect the number of African American and Native American children swept up from their communities and placed into foster care, whether they are justifiably there or not.<sup>241</sup> Besides focusing on critical junctures within the existing foster care system to address racial disproportionality and disparity in foster care,<sup>242</sup> these larger, critical junctures allow America as a society to collectively examine its priorities and which faucets to correspondingly close and which to open.

## 2. Feedback Loops Reveal Foster Care Priorities

As noted above, a system's true purpose is defined by how it acts, not its rhetoric.<sup>243</sup> Feedback loops tend to reinforce or regulate a system's behavior.<sup>244</sup> In theory, "the foster care system was designed to provide *temporary* care" to at-risk children.<sup>245</sup> Foster care was intended as a last, not first resort, which it has become particularly for families of color.<sup>246</sup> Indeed foster care remains the largest placement option for children in the system, especially indigent children of color, where they face high risk of secondary harm.<sup>247</sup>

Although the federal government has reported a steady decline in the number of children in care, as examined earlier, the number of children "served" by the system still remains at over half a million. Under a systems analysis, the "foster care industrial complex" appears

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241. See *supra* notes 223–27 and accompanying text.

242. See *supra* notes 214–17 and accompanying text.

243. See *supra* notes 186–87 and accompanying text.

244. See *supra* notes 186–87 and accompanying text.

245. CRAIG & HERBERT, *supra* note 2. Historically foster care remained the province of private, faith-based entities. *Id.* at 1.

246. See *supra* notes 2, 3, 7, 15 and accompanying text.

247. See *supra* Part II.D.

to be reinforcing itself.<sup>248</sup> The foster care industrial complex is a big business.<sup>249</sup>

Through the title IV-E Foster Care program, the Children's Bureau supports states (plus the District of Columbia and Puerto Rico) [to] provide board and care payments for eligible children who are under the supervision of the state and placed in foster family homes or childcare institutions that are safe and licensed. The program is authorized by title IV-E of the Social Security Act, as amended, and implemented under the Code of Federal Regulations (CFR) at 45 CFR parts 1355, 1356, and 1357. The program's focus is children who are eligible under the former Aid to Families with Dependent Children program and who were removed from their homes as the result of maltreatment, lack of care, or lack of supervision.<sup>250</sup>

But incentives exist to place children in government-subsidized foster care, instead of with these children's families and friends who would care for their children for free.<sup>251</sup> These reverse financial incentives in public foster care allow states to seek reimbursement from the federal government for their costs "based on the number of children in foster care per day. There are no financial incentives to move children out of foster care."<sup>252</sup>

Ever since 1961 when Congress allowed welfare assistance to follow poor children from their homes into their foster care placements, foster care became much cheaper for the states and foster care grew.<sup>253</sup> In the

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248. Wexler, *supra* note 60, at 443.

249. *See id.* at 444 (explaining how the foster-care institution swallows up the money that could fund "better alternatives"); *see also supra* notes 9–16 and accompanying text.

250. Children's Bureau, *Foster Care*, ACF.HHS.GOV, <http://www.acf.hhs.gov/programs/cb/focus-areas/foster-care> (last visited Nov. 6, 2013).

251. *Incentives and Cultural Bias Fuel Foster Care*, *supra* note 14; *see also* ROB GEEN & KAREN C. TUMLIN, THE URBAN INST., STATE EFFORTS TO REMAKE CHILD WELFARE: RESPONSES TO NEW CHALLENGES AND INCREASED SCRUTINY 5 (1999), available at <http://www.urban.org/publications/309196.html> (noting that "[e]xperts also suggest that this funding structure provides a financial incentive for states to place children into foster care rather than providing services to keep families intact"); *cf.* Roberts, *supra* note 16, at 1627 (quoting then-director of the Berkeley Center for Social Services Research, "the foster care payment system may act as an incentive for a troubled family to seek a formal agency-supervised placement with kin rather than share child-rearing responsibilities informally with the same relatives"); WINOKUR ET AL., *supra* note 7, at 13.

252. CRAIG & HERBERT, *supra* note 2.

253. *See* MURRAY & GESIRIECH, *supra* note 240, at 2 ("Under ADC-Foster Care, states received federal matching funds for foster care payments made on behalf of children who were removed from unsuitable homes."). This federal reimbursement was only available to

1970s, as Professor Martin Guggenheim notes, federal laws and policies called on foster care officials to “rely on foster care as a first, rather than a last, alternative.”<sup>254</sup> These federal programs provided unlimited reimbursements for out-of-home placements and only limited funding for family preservation programs.<sup>255</sup> Although Congress in the 1980s and 1990s attempted to remedy states’ tendencies to resort to foster care as a solution to helping at-risk children and reducing their lengths of stay in foster care through legislation,<sup>256</sup> the effect has been, instead, an increase in the number of children in foster care with practices that encourage them to be adopted and not reunified with their families.<sup>257</sup>

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children who qualified for ADC if left at home; in other words, poor children relying on welfare benefits. *Id.*; see also Nat’l Coal. for Child Prot. Reform, *A Child Welfare Timeline*, NCCPR, <http://nccpr.info/a-child-welfare-timeline> (last updated Sept. 12, 2010) [hereinafter NCCPR] (citing Marguerite Rosenthal & James A. Louis, *The Law’s Evolving Role in Child Abuse and Neglect*, in *THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT* 55, 62–64 (Leroy Pelton ed., 1985)).

254. Guggenheim, *supra* note 3, at 142 (citing Aid to Families with Dependent Children-Foster Care (AFDC-FC), AFDC-FC, Title IV-A of the Social Security Act, 42 U.S.C. § 603(n)(1)(A) (1999), “which required child protection officials to remove children from their families in order to qualify for precious federal funding”); see also MURRAY & GESIRIECH, *supra* note 240, at 2–3.

255. Guggenheim, *supra* note 3, at 142 (citing 42 U.S.C. § 603(n)(1)(A)). Enacted at the end of the Carter Administration, at first the Adoption Assistance and Child Welfare Act was heralded as “spending \$1 billion on family preservation,” but the subsequent Regan Administration gutted the enforcement provisions of the law that required foster care agencies to make reasonable efforts to keep families together. NCCPR, *supra* note 253. During the Clinton Administration, Congress next passed the Family Preservation and Support Act in 1992, and this legislation has been subsequently reauthorized and renamed to the Promoting Safe and Stable Families Act of 1993, Pub. L. No. 103–66. *Id.* For the legislative history and purpose of the reauthorized law through 2016, see GAIL COLLINS ET AL., DEP’T OF HEALTH & HUMAN SERVS., PROMOTING SAFE AND STABLE FAMILIES: HISTORY & PURPOSE: 2012 PSSF PRE-MEETING WEBINAR (Apr. 4, 2012), available at [http://nrcinhome.socialwork.uiowa.edu/events/documents/FinalPromotingSafeandStableFamiliesPresentation4-4-12\\_001.pdf](http://nrcinhome.socialwork.uiowa.edu/events/documents/FinalPromotingSafeandStableFamiliesPresentation4-4-12_001.pdf). See generally MURRAY & GESIRIECH, *supra* note 240.

256. See Guggenheim, *supra* note 3, at 142, 144; NCCPR, *supra* note 253 (remarking how Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 501, 501, at first worked to reduce numbers of children in foster care by promoting “permanence—including, but not restricted to keeping families together”); H.R. REP. NO. 105-77, at 8 (1997) (intending with the reasonable efforts requirement in the Adoption and Safe Families Act to prevent the removal of children from their families, or when removal is absolutely necessary, then to return them to their families as soon as possible with services and support).

257. MURRAY & GESIRIECH, *supra* note 240, at 5 (describing how the Adoption and Safe Families Act of 1997, Pub. Law No. 105-89, 111 Stat. 2115, 2123, reversed a perceived bias in favor of family preservation and swung the pendulum back towards foster care and even encouraged states to promote adoptions of children in foster care with incentive payment programs); see also Guggenheim, *supra* note 3, at 143–44; NCCPR, *supra* note 253

Because the financial incentives favoring foster care have not changed, despite changes to the laws themselves, the foster care system in America remains its own priority.<sup>258</sup> Indeed, both law and economics would predict the same thing—social welfare bureaucracies will inevitably find ways to justify their consumption of resources and will always seek more to support their mission.<sup>259</sup>

#### V. SYSTEMS THINKING STRATEGIES TO ADDRESS RACIAL BIAS AND CHANGE SYSTEMS

Regardless of which side of the debate you find yourself, whether the overrepresentation of African American and Native American children in foster care is justified or biased, the stark fact remains that

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(noting how the laws have changed over the years but the financial incentives to fund foster care through “open-ended federal entitlement[s] for states and localities” have not). Although for the three years prior, the number of children who exited foster care exceeded those who entered it; in FY 2011, more children entered foster care than exited. TRENDS IN FOSTER CARE AND ADOPTION, *supra* 29, at 1; CRAIG & HERBERT, *supra* note 2, at 4 (citing statistics from 1983 to 1994 and remarking how over the last three decades, both the size and scope of foster care has grown with more children entering it than leaving). The longer the child remains in foster care moreover, the more likely he or she will stay there and the less likely that child will ultimately be reunified with family. *See, e.g.*, AFCARS REPORT, *supra* note 29, at 4–5 (reporting increasing percentages of children with a goal other than reunification when the mean length of time in foster care was almost three years); D.C. GOV’T CHILD & FAMILY SERVS. AGENCY, ANNUAL PUBLIC REPORT FY 2010, at 20 (2011) (reporting percentages of children in DC’s foster care and over half (at 58%) were there for two years or more).

258. By looking at the numbers of children still “served” by the foster care system, it appears that positive feedback loops are driving or maintaining this half a million population of disproportionately African American and Native American children. *See supra* note 181. Stated another way, the negative feedback loops do not appear to have as strong an effect on regulating the numbers and disproportionate representation of these children in the system. *See supra* note 187 and accompanying text.

259. Those with power exploit it to protect their interests. *See* BARTON, *supra* note 205, at 21. “We propose the general hypothesis: every industry or occupation that has enough political power to utilize the state will seek to control entry. . . . Crudely put, the butter producers wish to suppress margarine and encourage the production of bread.” *Id.* (alteration in original) (quoting George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 5–6 (1971)). In his book, *The Careless Society: Community and Its Counterfeits*, John McKnight shows how American institutions have become “too powerful, authoritative, and strong. Our problem is weak communities, made ever more impotent by our strong service systems.” JOHN MCKNIGHT, *THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS*, at i (1995). In describing the “hidden curriculum” of service systems, he shows how professionals depend on clients over whom they have authority. *Id.* at 10. “Through the propagation of belief in authoritative expertise, professionals cut through the social fabric of community and sow clienthood where citizenship once grew.” *Id.*

children from these races are overrepresented in foster care. Both sides agree that as a nation, we have become numb and inattentive to the root causes of the problem: poverty, isolation of communities, unemployment, various forms of self-destructive behaviors, and conditions that lead people to feel desperate.<sup>260</sup> Unless and until there is massive social reform and attention to these root causes of the problem, we are complicit in sentencing these children to foster care, where studies repeatedly show they are at heightened risk of abuse and neglect—facing terrible odds for success and well-being. But that raises the question: what is to be done?<sup>261</sup>

That is a complicated question with no definitive answer, yet many have ideas, and a Google search of “addressing racial disparities in child welfare” yields more than five million results.<sup>262</sup> Many jurisdictions have begun to “gather and evaluate their own statistics to identify what groups are over- or underrepresented and where the disproportionality occurs (e.g., reporting, screening, placement) in order to determine the best way to address the problem.”<sup>263</sup> Many national organizations are also researching this social problem and corresponding policies and are publishing their findings and recommendations.<sup>264</sup> Even the federal

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260. *Race and Child Welfare Conference*, *supra* note 17 (according to Professor Randall Kennedy); *see also* Engle, *supra* note 64, at 46.

261. Howard A. Davidson, *Racial Disparities in the Child Welfare System: Reversing Trends*, 28 A.B.A. CHILD L. PRAC. 94, 94–95 (2009), available at [http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parentrepresentation/racial\\_disparities\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/racial_disparities_1.authcheckdam.pdf) (recommending strategies for system players, standards, and ultimate purpose of the system to affect how it works); *Race and Child Welfare Conference*, *supra* note 17 (according to Professor Randall Kennedy, changes to the foster care system will be racist either way by leading perhaps to under-protection of Native and African American children or excessive intervention in these families).

262. *Search Results*, GOOGLE, <http://www.google.com> (search “addressing racial disparities in child welfare”) (last visited Sept. 15, 2013). Some have called on Congress to repeal the provisions of the Adoption and Safe Families Act of 1997 “that unduly speed the termination of parental rights.” Soc. & Domestic Policy Comm’n, *Eliminating Race and Class Bias in Foster Care and Adoption No. 177*, AMERICANS FOR DEMOCRATIC ACTION (2005), <http://www.adaction.org/pages/issues/all-policy-resolutions/social-amp-domestic/177-eliminating-race-and-class-bias-in-foster-care-and-adoption.php>.

263. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 3–4; *see also* Davidson, *supra* note 261, at 95 (“Courts must compile *their own* racial disparity data for all key decision points to set benchmarks, monitor progress, and ensure racially fair treatment and outcomes.”).

264. *See, e.g.*, CTR. FOR THE STUDY OF SOC. POLICY, CHILD WELFARE PRACTICE: CREATING A SUCCESSFUL CLIMATE FOR CHANGE: FINDINGS AND CONSIDERATIONS FROM AN INSTITUTIONAL ANALYSIS 1 (2012), available at <http://www.cssp.org/publications/child-welfare/institutional-analysis/Child-Welfare-Practice-Creating-a-Successful-Climate-for->

government has highlighted the best practices and approaches that fall broadly into two different categories: (1) strengthening the existing foster care system by acknowledging racial bias at critical junctures, documenting it, and addressing systemic failures there through increased training, educating, reporting and litigation; and (2) changing the foster care system itself by collectively rethinking and prioritizing the system's true purpose.<sup>265</sup> Each approach has its strengths, and neither is mutually exclusive. Both approaches, moreover, fit neatly within a systems thinking framework, as explored in this Part.

#### A. Addressing Racial Bias within the Foster Care System

As systems thinking shows, one of the best ways to address racial bias within the existing system is to target the leverage points or core domains where it is most prevalent: reporting, investigation, service delivery, removal, and placement.<sup>266</sup> The Child Welfare Information Gateway recommends increased training at the critical junctures, and especially training mandated reporters to “distinguish neglect from poverty.”<sup>267</sup>

“Systemic learning requires people to be willing to work jointly with those who have other perspectives, but most importantly it requires those involved to reflect on the outcomes of their actions and modify their behaviours, beliefs and interventions on the basis of that reflection.”<sup>268</sup> According to the Child Welfare Information Gateway,

By working proactively and in conjunction with other agencies and service providers, child welfare agencies can implement preventive measures, build family support, and offer services to vulnerable families before abuse and neglect occur. These efforts can be designed for the general population or targeted for specific at-risk groups. . . . Targeted prevention efforts that include a strong cultural competence component reflected in

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Change.pdf (highlighting California's approach for addressing that African American and Native American children “are overrepresented in the child welfare system”); *Child Welfare and Foster Care Systems Publications*, CHAPIN HALL UNIV. CHI., <http://www.chapinhall.org/research/areas/Child-Welfare-and-Foster-Care-Systems> (last visited Nov. 6, 2013).

265. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *THE MULTIETHNIC PLACEMENT ACT: MINORITIES IN FOSTER CARE AND ADOPTION* 1–5, 69–72 (2010).

266. See *supra* Part IV.B.

267. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 7.

268. CHAPMAN, *supra* note 182, at 13.

staffing and training may be especially useful.<sup>269</sup>

The importance of education and training for all players indeed cannot be overstated in overcoming the cultural differences that sometimes separate races in foster care.<sup>270</sup> Cultural competence, according to the standards of the National Association of Social Workers, is “the process by which individuals and systems respond respectfully and effectively to people of all cultures, languages, classes, races, ethnic backgrounds, religions, and other diversity factors in a manner that recognizes, affirms, and values the worth of individuals, families, and communities and protects and preserves the dignity of each.”<sup>271</sup> Similarly for lawyers and judges, the ABA has called for legal training on “cultural competency; identifying institutional and unconscious biases; and avoiding disparate treatment of racial and ethnic minority children and families.”<sup>272</sup>

Another concrete measure that the system players are implementing is standardizing the decision-making process through risk assessment tools designed to minimize some error.<sup>273</sup> “Workers who have detailed and culturally relevant guidelines about what constitutes abuse and neglect can more easily control bias.”<sup>274</sup> Similarly, “[d]ifferential response, also known as alternative response or dual track response, refers to the use of a tailored response for families reported for child maltreatment.”<sup>275</sup> This strategy is also widely touted for confronting

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269. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 5 (citing CTR. FOR CMTY. P'SHIPS., *supra* note 150).

270. *See id.*; Davidson, *supra* note 261, at 94; NRC WEBINAR, *supra* note 101 (noting how important it is for all, especially parent practitioners, not to deny our own biases but to acknowledge their impact on the client families and strategize of ways to overcome them).

271. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 5 (quoting NAT'L ASS'N OF SOC. WORKERS, INDICATORS FOR THE ACHIEVEMENT OF THE NASW STANDARDS FOR CULTURAL COMPETENCE IN SOCIAL WORK PRACTICE 12–13 (2007)) (internal quotation marks omitted). “Cultural competence needs to permeate every part of an organization, from policymaking to administration to frontline practices, and should be an ongoing component of training for all staff, as well as a centerpiece of recruiting a diverse workforce.” *Id.* at 5–6.

272. Davidson, *supra* note 261, at 94.

273. *See* ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 8.

274. *Id.* (cautioning that not all standardized assessment tools have been “sufficiently tested on children from racial and ethnic minority groups, thus leading to a potential increase in bias”). One good example is the California Family Risk Assessment (CFRA), which was tested and found not to “disproportionately select families of color as being at high risk.” *Id.*

275. *Id.* at 10.



racial bias in foster care because it rejects the “one response fits all” approach to children at risk, especially those at the margins of placement or low risk of harm if left at home.<sup>276</sup> Because some argue that many children are needlessly removed from their homes,<sup>277</sup> differential response provides families with more options for involvement and its “flexibility . . . means that it is one positive way for jurisdictions to address disproportionality, if they find that a disproportionate number of families of color are substantiated for child maltreatment.”<sup>278</sup> Funded by the Children’s Bureau in 2009, the National Quality Improvement Center on Differential Response in Child Protective Services at the University of Colorado Denver has been using research-based methods for evaluating if differential response is an effective approach in foster care.<sup>279</sup>

All of these pilot projects and evidence-based practices signal hope that as a society we can reduce race and class disparities while keeping at-risk children safer. For a system widely considered dysfunctional and even harmful to children, it deserves our close consideration. As Cahn, Robbins, and Nash note: “Racial disparities perpetuate stereotypes, fragment families, depopulate communities, and impede racial healing. We are all losers when disparities remain entrenched. Democracy requires public systems to use what we learn and know from individual cases, pilot projects, and successful programs in remote sites.”<sup>280</sup>

But when a system is too entrenched in perpetuating itself such that it cannot see its own systemic failures, system players have another strategy grounded in American history and its civil rights legacy: litigation.<sup>281</sup> Litigation is sometimes necessary because, according to Meadows, “There is a systematic tendency on the part of human beings

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276. *Id.*; see also Davidson, *supra* note 260, at 94.

277. See, e.g., Vivek S. Sankaran, *Protecting a Parent’s Right to Counsel in Child Welfare Cases*, 13 MICH. CHILD WELFARE L.J. 2, 2 (2009), available at [http://chanceatchildhood.msu.edu/pdf/CWLJ\\_fa09.pdf](http://chanceatchildhood.msu.edu/pdf/CWLJ_fa09.pdf) (“Each year, far too many children needlessly enter foster care, costing states millions of dollars and inflicting unnecessary emotional trauma on children.”).

278. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 10.

279. See *Quality Improvement Center on Differential Response*, UNIV. COLO. SCH. MED., <http://www.ucdenver.edu/academics/colleges/medicalschoo/department/pediatrics/su bs/can/QIC-DR/Pages/QIC-DR.aspx> (last visited Nov. 6, 2013).

280. Cahn et al., *supra* note 232, at 171.

281. See Cooper, *supra* note 18 (noting that foster care is one system manifesting a modern-day civil rights tragedy, but advocates have an arsenal of tools to combat it).

to avoid accountability for their own decisions.”<sup>282</sup> Systems fail when their players presume they know best, which makes them resistant to change.<sup>283</sup> “For people of color, litigation has always been the most essential governmental resource in the protracted struggle for racial equality in America.”<sup>284</sup>

One litigation strategy that change agents in foster care contemplate is challenging the vague and overarching legal standard, the best interests of the child, on equal protection grounds and theories of inferred intent to discriminate in foster care practices.<sup>285</sup> Challenging racial disproportionality in foster care through litigation in the traditional civil-rights style (i.e., prove racial discrimination not only in effect but also in intent) is incredibly difficult, as Cahn and Robbins demonstrate in the juvenile justice manifestation of the racial bias problem in America.<sup>286</sup> According to the Supreme Court in *Washington v. Davis*, a challenger must show discriminatory purpose in addition to disparate impact in order to overturn a facially-neutral law like best interests of the child on equal protection grounds.<sup>287</sup> But Cahn and Robbins suggest that discriminatory purpose can be inferred when officials in the system have notice they cause predictable injury and fail to adopt any alternatives that could alleviate that injury: known as “constructive intent.”<sup>288</sup> In their article, *Public Notice Forums: Choosing Among Alternatives to Confront the Intent Requirement*, Cahn and his colleagues map a similar litigation strategy applicable to foster care.<sup>289</sup>

Other litigation strategies with proven success target the subjective decisions and unintended bias made at the critical junctures in foster care.<sup>290</sup> High-quality parent representation is one such strategy.<sup>291</sup>

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282. *Places to Intervene in a System*, *supra* note 187, at 82.

283. See CHAPMAN, *supra* note 182, at 12.

284. Brooks, *supra* note 89, at 108.

285. See Lawrence, *supra* note 85, at 318 (reconsidering the doctrine of discriminatory purpose established in *Washington v. Davis*, 426 U.S. 229, 239 (1976)); see also Cahn & Robbins, *supra* note 152, 73–74 (2010) (applying *Washington v. Davis* to confront racial disparities in juvenile justice). Intent can be inferred, however, others argue when disproportionality exists and cost-effective alternatives to combat that are ignored. See *id.*; Brooks, *supra* note 89, at 94.

286. See Cahn & Robbins, *supra* note 152.

287. *Washington*, 46 U.S. at 239.

288. Cahn & Robbins, *supra* note 152, at 85.

289. See Cahn et al., *supra* note 232 at 165–66, 168–69, 171.

290. See Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 15 (2010) (highlighting the due process deserts in foster care cases where the absence of procedural

According to the Director of the ABA Center on Children and the Law, well-trained, culturally-competent lawyers need to be quickly appointed whenever removal of a suspected at-risk child is contemplated.<sup>292</sup> In her essay as a parents' attorney in the foster care system, Tracy Green shares this insight:

The system's laws and policies . . . are fundamentally biased against parents in their application and practice. The bias is deeply rooted in our society's disdain for the poor or ignorance regarding the [e]ffects of poverty. This bias is so extreme, that it obfuscates the glaring harm that foster care imposes upon the very children the system seeks to protect. It is, therefore, through primarily the zealous, diligent, and effective advocacy of the parent's attorney in child welfare proceedings that the negative consequences imposed on children by foster care can be combated and averted.<sup>293</sup>

### *B. Changing the Foster Care System Itself*

Meaningful change is accomplished in self-perpetuating systems with strategic advocacy designed to effect change to the system's underlying purpose. Many successful approaches already do just that: they aim to switch the system's priority of foster care over family care through in-home services to families that avoid foster care altogether.<sup>294</sup> In-home service programs have empirically demonstrated their success with families of color.<sup>295</sup> Other family preservation and support services, including kinship care, are offered as examples of how to address racial disproportionality, especially if children never enter the system.<sup>296</sup>

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safeguards at critical hearings must be filled).

291. See Davidson, *supra* note 261, at 94. But not all jurisdictions provide parents a right to counsel. See Sankaran, *supra* note 277, at 2.

292. Davidson, *supra* note 261, at 94 (suggesting parents' attorneys promptly act for appropriate services offered to at-risk families in the home so foster care can be avoided).

293. Tracy Green, *Parent Representation in Child Welfare: A Child Advocate's Journey*, 13 MICH. CHILD WELFARE L.J. 16, 16 (2009), available at [http://chanceatchildhood.msu.edu/pdf/CWLJ\\_fa09.pdf](http://chanceatchildhood.msu.edu/pdf/CWLJ_fa09.pdf) (footnote omitted).

294. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 6 ("The goal of in-home services is to provide support, education, and resources for parents who may be struggling. If families can be served in their homes, then maltreatment and involvement with the child welfare system may be avoided.").

295. *Id.* at 6-7 (citing a longitudinal study by David Olds and his colleagues of low-income African American mothers and children in Tennessee and finding several positive outcomes associated with in-home services).

296. *Id.* at 10.

To be more effective, ultimately the way this system is funded to favor foster care must change. According to Davidson, “Congress must change the formula for state matching funds to child welfare agencies, so that services to preserve and strengthen families and address family crises are federally supported at equal or higher rates than for out-of-home child placement.”<sup>297</sup> Once the incentives that reinforce the actions of the system change or are re-prioritized, the entire system is different.

Many believe foster care ultimately belongs to communities, not federal and state government agencies.<sup>298</sup> Not only is that approach much cheaper in our current economic climate, advocates insist, but it actually empowers families while addressing the risk factors that threaten to destroy them.<sup>299</sup> Foster care belongs to communities because children belong to those communities.<sup>300</sup> “It takes a village to raise a child,” according to the proverb.<sup>301</sup>

Researchers Evans and Myers offer that “[t]oday we have considerable knowledge about what makes programs for young children

297. Davidson, *supra* note 261, at 95.

298. See Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 152 (2001).

299. See Wexler, *supra* note 60, at 448 (“The only way to fix foster care is to have less of it.”).

300. Social science research tells us that many communities parent in networks. See, e.g., Berger, *supra* note 163, at 301 (citing Elizabeth Janeway that “the idea of an individual having the sole responsibility for child-rearing is the most unusual pattern of parenting in the world”). Many relationships, including godparent, are considered kin, and communities come together to raise their own. Traditions and cultures are preserved in this model; and families are defined more broadly. Many African cultures regard children born in their communities as belonging to everyone, as the following proverbs go:

In Lunyoro (Banyoro) there is a proverb that says “Omwana takulila nju emoi,” whose literal translation is “A child does not grow up only in a single home.” In Kihaya (Bahaya) there is a saying, “Omwana taba womoi,” which translates as “A child belongs not to one parent or home.” In Kijita (Wajita) there is a proverb which says “Omwana ni wa bhone,” meaning regardless of a child’s biological parent(s) its upbringing belongs to the community. In Kiswahili, the proverb “Asiyefunzwa na mamae hufunzwa na ulimwengu” approximates to the same.

*Proverb: It Takes a Whole Village to Raise a Child*, H-AFRICA, <http://www.h-net.org/~africa/threads/village.html> (consortium of scholarly lists on African history, culture and studies) (last updated Feb. 5, 1996).

301. See generally JANE COWEN-FLETCHER, *IT TAKES A VILLAGE* (1994) (highlighting in this children’s story how an entire African village stepped in to help a young girl watch her baby brother while their mother was busy); HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1996). But see Roberts, *supra* note 16, at 1619 (noting that U.S. public policy assumes the opposite: that caregiving is a private matter).

and their families successful. We have understood the importance of community involvement in all steps of the process, building on what already exists within a community, and creating partnerships to help sustain efforts.”<sup>302</sup>

Community-controlled foster care is a concept indeed consistent with one of the most successful systems change strategies: collective impact. Under this theory, all stakeholders come together willingly and equally to examine the domain in most sets of interlinked decisions are producing these disparate outcomes for families of color.<sup>303</sup> Collective impact relies on a notion of equality, consistent with true systems practice, which is “characteristically different from the command-and-control approach in that . . . engagement with agents and stakeholders would be based more upon listening and co-researching than on telling and instructing; responsibility for innovation and improvement would be widely distributed.”<sup>304</sup>

In foster care, this community-based, strengths-focused approach is known as Family Group Decision-Making (FGDM), in which the agency “provides support and information to help the extended family come together and develop a plan for the safety and well-being of the child.”<sup>305</sup> According to the Child Welfare Information Gateway,

The use of FGDM reflects the traditional values of kinship and community seen, for example, in African cultures, as well as Native American Tribal culture. It may also help promote a community-based approach to addressing disproportionality. FGDM can also help the community at large view child welfare workers and agencies in a more positive light.<sup>306</sup>

To truly address racial bias in the foster care system, proponents of this FGDM (also known as Family Group Conferencing (FGC)) approach believe that the focus must shift toward allocating more power to disenfranchised families whose children are swept up into the foster

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302. Evans & Myers, *supra* note 170, at 2.

303. See Susan Sturm, *Civil Rights in the American Story: Reframing the Equality Agenda*, UNIV. OF ALA. SCH. OF LAW (Mar. 8, 2013), <http://www.law.ua.edu/programs/symposiums/podcast/> (follow “Session IV” hyperlink under “Civil Rights in the American Story”) (citing LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002)).

304. CHAPMAN, *supra* note 182, at 21.

305. ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 31, at 10.

306. *Id.* at 12 (internal citations omitted).

care system.<sup>307</sup> Making the families equal decision-makers also signals that these families are not inherently inferior or less equipped to care for their own children.<sup>308</sup> The state's participation could take the shape of supporting families in achieving their goals, particularly with the provision of resources. And providing these resources would, in turn, help to overcome some of the historic racism and disenfranchisement of African American and Native American people because it could symbolize the state's assumption of accountability for African American and Native American people's subordinate positionality on certain indices of economic and social well-being, including wealth, educational attainment, employment, housing, and health.

FGC is part of the broader restorative justice concept, which offers an alternative way of perceiving and responding to crime and other conflict.<sup>309</sup> Restorative justice is "a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."<sup>310</sup> Some of the themes underlying restorative justice and FGC in particular are shared responsibility for solutions, shared leadership and power, cultural competency, and community partnerships.<sup>311</sup> From a systems change perspective, a map of a restored model of foster care system might look like this:

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307. See Azar & Goff, *supra* note 27, at 562–63 (highlighting the use of the research-based practice of FGC but questioning its effectiveness); Berger, *supra* note 163, at 301–02 (arguing that a cognitive shift must occur before myths and stereotypes that are so embedded in our culture change).

308. See Berger, *supra* note 163, at 302.

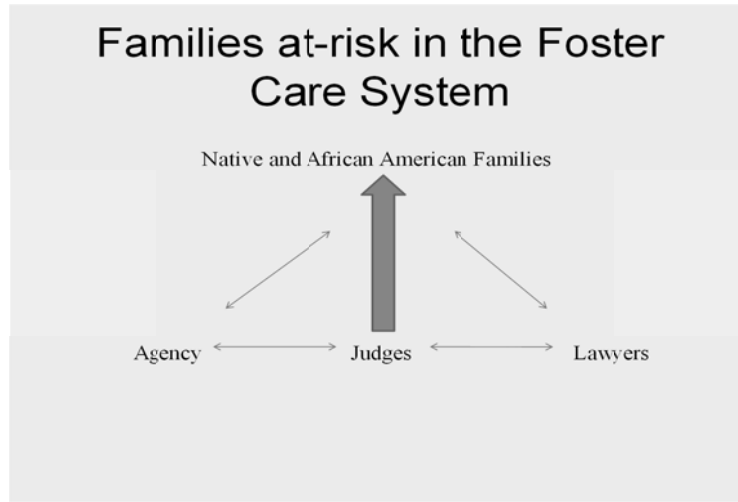
309. Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255 (2005); see also Berger, *supra* note 163, at 303–04 (suggesting definitions of family change to include not only the husband, wife, and child so ingrained in our culture but also all adult caregivers who share in parenting a particular child). Berger imagines how an advocate would portray this notion to a decision maker by suggesting a different story:

Mary's mother cares for her family's needs by working. Mary's family is large, including her aunt, cousins, and grandmother as well as close friends and neighbors. Mary spends her after-school hours with a caregiver whose family lives in the neighborhood; at other times, family members and family friends share in caring for Mary.

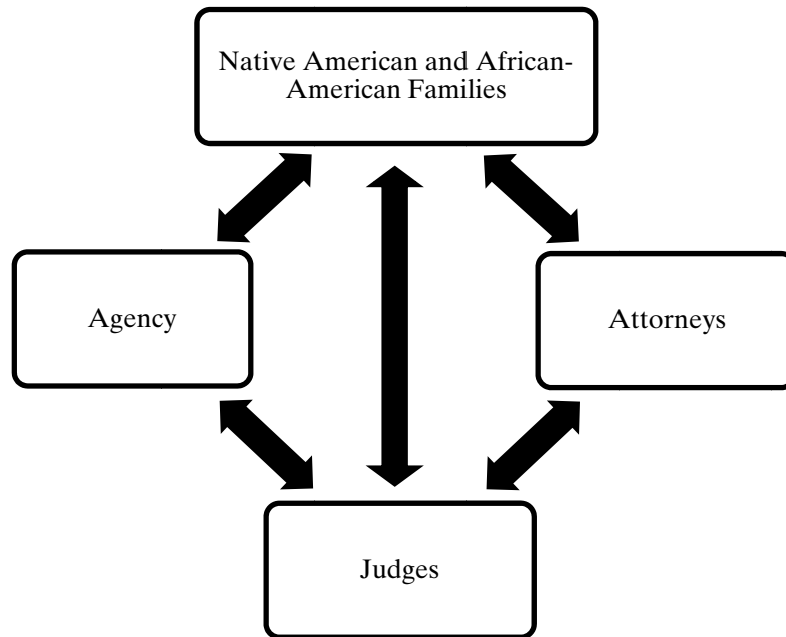
*Id.* at 304.

310. Umbreit et al., *supra* note 309, at 256 (quoting Howard Zehr, whom many consider the "architect of the restorative justice movement") (internal quotation marks omitted).

311. See Susan M. Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216, 219. See generally Umbreit et al., *supra* note 309.



or this:



## VI. CONCLUSION

Foster care does more harm than good to many children, especially impoverished, minority children. Even if these children are genuinely at greater risk for maltreatment by their own families, these populations are nevertheless overrepresented in foster care. However unintentional, bias plays a role in these children's presence and experience in foster care. Removal of children from their families and communities inflicts damage, which is often greater than that which may have occurred had the families been left intact and support services provided, and it is not only individual families that suffer the consequences but society at large. Fortunately, there are alternative ways of perceiving these problems and innovative and cost-effective solutions are available.